



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 241 OF 2015

BETWEEN

DANIEL MWACHIRO.....CLAIMANT

VERSUS

1. FATUMA WAMBUI KAMAU

2. ALI MOHAMED SHEI

3. ATHUMANI ALI ATHUMANI.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Oluga & Company Advocates for the Claimant

Ndegwa Katisya Sitonik & Associates, Advocates for the Respondents

JUDGMENT

1. The Claimant filed his initial Statement of Claim on the 20th April 2015. It was amended and filed on 26th June 2015. He states he was employed by the deceased Husband to the 1st Respondent, in the family business known as Kisauni Timbersales and Hardware. He was employed as a General Labourer. The 1st Respondent's husband left a will bequeathing the business to the 1st Respondent. 1st and 2nd Claimants were appointed as the Executors of the will. The 1st Respondent continued to run the business and to employ the Claimant. On 4th July 2014, the Claimant's position was rendered redundant. The Claimant states he was paid terminal dues based on 3 years worked after the death of the 1st Respondent's Husband, instead of 19 years worked for the entire period. He prays for the following orders against the Respondents:-

- a. Annual leave pay for 19 years at Kshs. 7,200 per year, added up at Kshs. 136,800.
- b. Service/ gratuity for 19 years at Kshs. 128,250 less gratuity for 3 years paid at Kshs. 18,175,

totaling Kshs. 110,075.

Total... Kshs. 246,875

c. Costs, Interest and any other suitable relief.

2. The 1st Respondent filed a Reply to the Amended Claim on 15th July 2015. She states she runs a business in Mombasa under the name Kisauni Joinery and Timbersales. The business is a sole proprietorship, registered on 5th July 2011, and in existence only since then. The Claimant was an Employee of the business for 3 years of its existence. He confirms this at paragraph 10 of his Amended Claim. The 1st Respondent terminated the Claimant's contract of employment on the ground of redundancy, on 4th July 2014. The sole proprietorship namely Kisauni Timbersales & Hardware ceased to exist in law, upon the demise of the 1st Respondent's Husband Yusuf Kang'ara Kuria. The 1st Respondent cannot shoulder any liability attaching to the demised sole proprietorship. The 1st Respondent and the Claimant appeared before the Labour Office, where Claimant's terminal dues were calculated and paid in accordance with the Employment Act. The Parties signed an Agreement Form before the County Labour Office on the 4th August 2014. The 1st Respondent prays for dismissal of the Claim with costs to the 1st Respondent.

3. 2nd and 3rd Respondents filed their joint Statement of Response on the 28th July 2015. They agree they were appointed the Executors of the will of Yusuf Kang'ara Kuria. The deceased was sole proprietor of the business at the time he died. 2nd and 3rd Claimants were not involved in the day to day running of the business and do not know about the Claimant's employment history. Their involvement was to distribute the deceased's estate in accordance with his will. They distributed the estate and rendered full account. They pray the Claim is dismissed with costs to them.

4. The Parties were heard on the 28th July 2016. The Claimant testified as did the 1st Respondent and the 2nd Respondent.

Claimant's Case

5. The Claimant relied on his Witness Statement, whose contents, are summarized at paragraph 1 above.

6. Cross-examined, he stated he was initially employed by Yusuf Kang'ara at Kisauni Timbersales and Hardware. He was a General Labourer. He later worked for the 1st Respondent in the same business, upon the death of her Husband. He conceded he stated in his Amended Claim, that the 1st Respondent registered a different business, Kisauni Joinery and Timbersales, after the death of her Husband. Paragraph 10 states he worked for the 1st Respondent for 3 years. He was not able to say who owned the business. He does not claim anything with regard to the 3 years worked directly, under the 1st Respondent.

7. 1st Respondent was named as an heir under the will. The Plot was devolved to the deceased's Mother, not the 1st Respondent. Paragraph [f] of the will states the business at Plot No. 1365/ 1/ MN, would be devolved to the deceased's wife [1st Respondent] and his Children except Zacharia Kuria. There is evidence the business devolved to the 1st Respondent.

8. The Claimant told the Court he was availed annual leave pay for a few years as acknowledged by him in Respondent's appendix 8[a], [b] and [c]. He agreed also that the 1st Respondent opened up a new business after the death of her Husband.

9. Re-directed, the Claimant stated the business name changed after the death of 1st Respondent's Husband. He continued working at the same business, and performed the same role. The deceased's will,

shows the business was inherited by the 1st Respondent and her Children. The Claimant worked for the deceased from the year 1995 to 2010. The annual leave pay received by the Claimant was with regard to 7 years. He was only an Employee, and not able to say if the deceased's will was honoured.

Respondent's Case

10. The 1st Respondent adopted her Witness Statement on record, whose contents are reflected at paragraph 2 of this Judgment.

11. She agreed on cross-examination, that she inherited her Husband's business as shown in the will. There was no work at the premises after her Husband died. She returned to the premises in January 2011. The Claimant approached the 1st Respondent and agreed he would work for the business if it was re-opened. Redirected she testified that, the deceased's will indicated she was to inherit the business. She did not inherit the business. Deceased's Mother inherited the Plot from where the business is operated.

12. Ali Shei adopted his Witness Statement on record. He reiterated the contents of the Statement of Response filed on his behalf, summarized at paragraph 3 above. His role was that of an Executor of deceased's will.

13. Questioned by the Advocate for the Claimant, he stated he is a retired Kadhi. He was the Executor of the will. The will referred to business at Plot No. 1365 Kisauni. The business was to devolve to deceased's Wife. He was to execute in favour of the 1st Respondent. He has not executed. He is in the process of completing execution. His Witness Statement states he executed, and rendered accounts. Paragraph 12 of his Witness Statement says the business was wound up. He had visited the premises, and saw no activities going on. There were debts at the time Yusuf died. She did not agree that Claimant's dues were part of these debts. He did not have details of the debts. He did not fail in his role as the Executor.

14. On redirection, Shei told the Court that the Claimant did not demand anything from him, before filing the Claim. The Certificate of Grant did not include deceased's business. When Shei visited the premises, no business was going on; all he found were business fliers. Shei was a friend to Yusuf, and undertook executor's duties voluntarily; he was not paid anything for discharging the role. He did not operate deceased's business. The Respondents pray for dismissal of the Claim.

The Court Finds:-

15. The Claimant asserts he was employed by the 1st Respondent for 3 years, from 2011 to 2014, at the 1st Respondent's timber business in Kisauni Mombasa. There is no claim with regard to this 3 year period the Claimant worked under the 1st Respondent.

16. The crux of the dispute is that the Claimant was previously employed, while the business was operated by the 1st Respondent's Husband Yusuf, who passed away on 16th December 2010. Mwachiro claims to have worked for the business for a period of 19 years, but was only rewarded and recognized through service pay based on 3 years worked under the 1st Respondent. His contention is that he should be paid for the service period of 16 years worked under the late Yusuf. He also argues he merits annual leave for the whole period of 19 years.

17. The prayer for annual leave for a period of 19 years does not appear to the Court persuasive. He prays for Kshs. 7,200 per year for 19 years. There were Petty Cash Vouchers attached to the Response, marked as annexure 8 [a] [b] and [c] showing annual leave pay made to the Claimant, for various years. The Claimant did not account for this in his claim for annual leave pay covering 19 years. He claimed annual leave pay for 19 years in his Statement of Claim, Witness Statement and evidence in chief. It was only on cross-examination that he attempted to explain what was paid was for 7 years. Why would he mislead the Court, until the Respondents questioned him on the Petty Cash Vouchers? The Claim for annual leave pay is rejected.

18. The Claimant was paid terminal dues calculated at Kshs. 26,645 by the 1st Respondent, witnessed by the Labour Office. The Court is satisfied this payment represented the period the Claimant worked under the 1st Respondent. There is no claim based on this period.

19. Was the 1st Respondent liable for employment obligations arising before the death of her Husband? There is evidence the business, regardless of the legal form under which operated, was passed onto the 1st Respondent through the will of Yusuf Kang'ara. It is specifically stated in the will that the business would devolve to the 1st Respondent and her Children, save for 1 Child who had inherited elsewhere. It is not relevant to this dispute that the Plot where the business operated from was devolved to mama Yusuf. We are concerned with the business, not the immovable property, and concerned with the question whether the 1st Respondent took control of her late Husband's business and assumed the role of an 'Employer,' in relation to the Claimant.

20. It was not even necessary that the Claimant shows the 1st Respondent obtained letters of administration devolving the business to her. It was not necessary that the Claimant demonstrated the business was legally devolved to the 1st Respondent, or that the 2nd and 3rd Respondents were appointed legal representatives of the deceased. All that the Claimant was required to show was that the 1st Respondent continued running her late Husband's business and that the Claimant continued to be employed by that family business. This is not a probate and administration cause, or a cause where probate and administration issues are decisive factors in resolving the employment dispute. It would suffice, if the Claimant showed the 1st Respondent was a Successor Employer.

21. The Court is satisfied the 1st Respondent continued to employ the Claimant at the family's timber business after her husband died. Her Husband died in December 2010, and in January 2011, she agreed with the Claimant that he continues working. This agreement did not depend on any will, letters of administration or certificate of business registration; it was simply an agreement between the Wife of a Businessman who had died, and an existing Employee in that business, for that Employee to continue working for the family business.

22. At the time the Claimant's position was declared redundant, he should have been paid severance, not service/ gratuity as claimed, based on 19 years of service, not 3 years under which the 1st Respondent was in effective control of the family business. His claim for the balance of severance pay, given that it is not disputed he left on redundancy, is merited. The computation of the sum of Kshs. 18,175 paid at the Labour Office, representing 3 years of service appears not to be contested by the Parties, and neither is the computation of the balance of 16 years at Kshs. 110,075 disputed. The dispute is whether additional severance is payable by the Respondents. It is payable, but not by all the Respondents. The 2nd and 3rd Respondents are improperly joined to the Claim. The Court does not think that by being named as legal representatives of the deceased, they became Employers to the Claimant. They did not operate the business, and the business was not even included in the Certificate of Grant issued by the Court, assuming that Certificate has any bearing on the dispute herein. Any person, even one unrelated to Yusuf, could have taken over the running of the business, assume control, and be deemed to be an Employer, shouldering the liabilities of old and new Employees. 2nd and 3rd Respondents were players for purposes of fulfilling devolution of the deceased's estate, confined to the assets listed on the Certificate of Grant, but were not appointed to run the family business. The 1st Respondent did not require Certificate of Grant to continue running her Husband's business, and the inclusion of the business in the will simply clarified that the deceased wished his Wife and Children to continue running the family business. It was not by error that the business was left out of the probate and administration cause. The 1st Respondent took over the control of the family business and its Employee, and should therefore solely meet liability. IT IS ORDERED:-

[a] The Claim against the 2nd and 3rd Respondents is declined.

[b] The 1st Respondent shall pay to the Claimant the sum of Kshs. 110, 075, being the balance of

severance pay.

[c] No order on the costs and interest.

Dated and delivered at Mombasa this 2nd day of December 2016.

James Rika

Judge