



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

**CAUSE NO. 147 OF 2013**

**(Originally Nairobi Cause No. 1233 of 2010)**

**JARED MASINDE OKUTOTO..... CLAIMANT**

**v**

**YUSUF DAWOOD BHAI.....1<sup>st</sup> RESPONDENT**

**ZOHER DAWOOD BHAI.....2<sup>nd</sup> RESPONDENT**

**(former Directors Hakimi Glaziers Ltd)**

**JUDGMENT**

1. Jared Masinde Okutoto (Claimant) sued Yusuf Dawood Bhai and Zoher Dawood Bhai (Respondents) as directors of Hakimi Glaziers & Superbargains, sometime in October 2010 in Nairobi and he stated the issue in dispute as unfair termination.
2. The Cause has had a chequered career after it was filed hence some background would be in order.
3. The Respondents filed a Notice of Appointment through Sheth Wathigo & Co. Advocates on 11 November 2010.
4. On 13 January 2013, the Respondents filed their List of Documents.
5. On 29 January 2014, the Claimant filed a Notice of Intention to Act in Person and on 10 March 2014, Magatta & Associates filed a Notice of Appointment of Advocates to act for the Claimant.
6. The Claimant filed an Amended Memorandum of Claim on 13 May 2014, having secured leave on 9 May 2014. In the Amended Memorandum of Claim, the Respondents were sued as former directors of Hakimi Glaziers Ltd.
7. The Respondents were granted leave to appeal against the ruling granting leave to amend the Memorandum of Claim but it is not clear whether an appeal was filed.
8. The Respondents filed an Amended Reply to the Amended Memorandum of Claim and a Preliminary Objection on 22 May 2014.
9. On the same day, Ongaya J directed that the preliminary objection be taken up during the hearing of the Cause on the merits.
10. The Cause proceeded to hearing on 18 February 2015 and 26 February 2015. The Claimant filed his submissions on 6 March 2015 while the Respondents filed their submissions on 23 March 2015.
11. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Cause is competent, date of Claimant's employment, whether termination of Claimant's employment was unfair, whether Claimant worked overtime, whether Claimant is owed accumulated leave and appropriate remedies.*

## Whether Cause is competent

12.The Claimant had initially sued the Respondents as Directors of Hakimi Glaziers & Superbargain.

13.In this original Claim, the Claimant pleaded that

The Respondent here in this matter is a registered Glass & Hardware dealer within the meaning of the Provisions of the Companies Act Cap. 486.....

14.In the Amended Memorandum of Claim, it was pleaded,

1. THAT the Claimant herein this matter aver that he was the employee of the Respondents **Hakimi Glass Ltd and Hardware (NKU) Ltd** (emphasis mine) in the meaning of the Provisions of the employment Act no. 11 of 2007...

2. THAT the Respondent her in this matter was a registered Glass & Hardware Dealer within the meaning of the Provisions of the Companies Act Cap 486.....

15.In the same Amended Memorandum of Claim, in the intitulement the Claimant showed that the Respondents were former Directors of (Hakimi Glaziers Ltd).

16.Right from the outset, the Respondents contended that the Claim was

2. inept, fatally defective, incompetent....

4. that Hakimi Glaziers & Hardware Limited and respondents were not the same.

17.The Respondents also contended that they could not be sued in their personal capacity as this was contrary to the principle in *Salmon v Salmon & Co. Ltd* (1897) AC 22.

18.The Claimant in the initial Memorandum of Claim annexed a contract of employment dated 1 February 2002 and acknowledgment of payment of dues dated 14 January 2010. The contract and acknowledgment of payment of dues were on the letter head of **Hakimi Glaziers Ltd**.

19.When the Claimant filed the initial Memorandum of Claim, the Respondents were sued as Directors of **Hakimi Glaziers and Super Burgain**).

20.Paragraph 1 of the Claim referred to the Claimant as being an employee of **Hakimi Glass and Hardware (NKU) Ltd**. Paragraph 2 referred to the company as a registered Glass & Hardware Dealer under the law.

21.It is apparent the Claimant was not sure of who was his employer, although the contract he had clearly indicated the employer, at least from 2002, was Hakimi Glaziers Ltd. He never bothered to sue the entity indicated in the contract letterhead.

22.When the Claimant sought leave to amend in 2014, the Respondents put him on notice that Hakimi Glaziers Ltd had been dissolved in 2010. But he still sued the Respondents as former Directors of Hakimi Glaziers Ltd.

23.Hakimi Glaziers Ltd cannot be the same as Hakimi Glass Ltd and Hardware (NKU) Ltd. How they are related was not disclosed.

24.But the Court recognises that the 2<sup>nd</sup> Respondent admitted in his testimony that the Claimant was an employee of Hakimi Glaziers Ltd of which he was a director.

25.The question therefore turns as to whether and how a juristic person which has been dissolved should be sued within the employment relationship.

26.It is trite that a registered company has separate legal personality from its directors.

27.The Respondents contend the Claimant could only sue them after lifting the corporate veil. The Respondent further contended that the Claimant should have invoked the provisions of sections 66 and 67 of the Employment Act, 2007 and made appropriate applications to the responsible Minister.

28.There are 3 indisputable facts. These are that at least from 1 February 2002 until separation, the Claimant was an employee of Hakimi Glaziers Ltd. Two, the Respondents were directors of Hakimi Glaziers Ltd during its juristic life. Three, that Hakimi Glaziers Ltd was dissolved in 2010.

29.There is no need to cite authority for the proposition that under general company law, a dissolved

- juristic person has no capacity to be sued directly.
30. But the question then is whether the current statutory framework has made inroads into the general principles of company law without delving into the complexities and nitty gritty of company.
31. In this regard, the Employment Act, 2007 defines an employer to mean
- any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.
32. In the instance case, the Court has no hesitation in finding that for the purposes of the Employment Act, 2007, the Respondents being *agents, managers* and *factors* of Hakimi Glaziers Ltd (now dissolved) were legally employers of the Claimant and he could competently sue them for causes of action arising out of the contract of service.
33. This finding is buttressed by the admission by the 2<sup>nd</sup> Respondent and the provisions of section 87(1) of the Employment Act, 2007 which provide that

87(1) Subject to the provisions of this Act whenever-

- (a) an employer or employee neglects or refuses to fulfill a contract of service; or
- (b) any question, difference or dispute arises as to the rights or liabilities of either party; or
- (c) touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service,

the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.

34. The Respondents were the human embodiment, the living souls of Hakimi Glaziers Ltd and for purposes of the Employment Act, 2007 were employers of the Claimant, capable of being sued independently of the company, whether dissolved or not.
35. The Court reaches the conclusion that the present Cause is competent and that the Respondents have the locus and capacity to be sued without lifting the veil, in the circumstances obtaining here.

### **Claimant's date of employment**

36. The Claimant pleaded that he was employed on 1 February 1992. He stated as much in testimony. But he only produced a contract confirming his employment from 2002.
37. The Respondents' pleaded case and witness testimony was that the Claimant was employed in 2002.
38. There was no statutory requirement prior to the Employment Act, 2007 upon employers to issue employees with written contracts of employment.
39. The Court only has the word of one party as against the other as to the pre 2002 employment.
40. With the material before Court, the Court finds that the employment relationship for purposes of this Cause commenced on 1 February 2002.

### **Whether termination of employment was unfair**

41. The 2<sup>nd</sup> Respondent who testified gave the reason for the termination of the Claimant (and 3 other employees) employment as low volumes of business in 2010.
42. The termination of employment on the part of the Claimant was therefore involuntary. It was a case of redundancy.
43. Section 40 of the Employment Act, 2007 provides for the conditions an employer should comply with before declaring a redundancy. The 2<sup>nd</sup> Respondent's testimony was that all the employees

- were sent off.
44. But there was no suggestion that the Claimant was given one month written notice of redundancy or that the local Labour Officer was informed.
45. The Claimant however was paid about Kshs 60,000/- which apparently included severance pay.
46. But all in all, the Respondent has not shown it complied with all the conditions for non-unionised employees like the Claimant. The termination of employment through redundancy was therefore unfair.

### **Overtime**

47. The Claimant prayed for overtime worked but not paid (during rest days, Saturdays and normal overtime).
48. The body of the Amended Memorandum of Claim did not lay any foundation or basis for the prayers for overtime.
49. In testimony, the Claimant testified he used to report to work at 8.30 am and leave at 5.30 pm but he did not disclose the years the overtime sought related to.
50. Hours of work are prescribed by statute (as a minimum) and the hours are industry based.
51. The Court was not referred to the Regulation of Wages Orders applicable to the sector the Respondents' operated in or even the Regulation of Wages (General) (Amendment) Orders. The prescribed statutory weekly working hours were not disclosed.
52. On the case as pleaded and evidence tendered, the Court is unable to find that the Claimant worked overtime.

### **Leave**

53. Employers are under a duty to keep employee records which include leave records. As a minimum, an employee is entitled to 21 days annual leave each completed 12 month cycle with full pay.
54. The Claimant stated in examination-in-chief that he never went on leave. It is only in cross examination that he stated that he never went on leave during the tenure of employment (18 years) but in the pleadings he sought leave for 3 years.
55. In the Amended Memorandum of Claim, the Claimant sought Kshs 25,200/- as annual leave. However, in the submissions, the Claimant increased the amount to Kshs 154,000/-. It was submitted that there was an error of calculation.
56. The Claimant should have laid a proper foundation for leave for 3 years and disclosed the years so that the Respondent and the Court would be put on notice as to the proper records but he did not.
57. The Claimant did not adequately prosecute the head of claim relating to leave. In this state of evidence tendered, the Court declines to find in favour of the Claimant.

### **Appropriate remedies**

#### ***One month pay in lieu of Notice***

58. The Claimant sought Kshs 12,000/- on account of one month pay in lieu of notice.
59. The 2<sup>nd</sup> Respondent's witness testimony that the Kshs 60,000/- included Kshs 12,000/- pay in lieu of notice was not challenged.
60. This head of claim is therefore declined.

#### ***Overtime (rest days, normal overtime)***

61. For reasons given in the body of the judgment, this relief is declined.

#### ***Compensation***

62. The Court has reached a conclusion that the employment of the Claimant was terminated through redundancy without complying with the conditions set out in section 40 of the Employment Act,

- 2007.
- 63.The Respondent submitted that it is legally unsound to claim both compensation and severance pay.
- 64.In my view, that submission is not supported by the law. Compensation becomes available when a termination (whether through redundancy or otherwise) is found to have been procedurally or substantively unfair, while severance pay is a statutory right/entitlement on termination through redundancy..
- 65.The Claimant is therefore entitled to compensation. Compensation is a discretionary remedy. The discretion is fettered by the factors set out in section 49(4) of the Employment Act, 2007.
- 66.The Claimant was paid certain dues. He served the Respondents for about 8 years.
- 67.Considering these factors, the Court would award the Claimant the equivalent of 6 months gross wages assessed as Kshs 60,000/- (based on the wage of Kshs 12,000/- per month).

### **Conclusion and Orders**

68.The Court finds and holds that the Claimant's employment was terminated on account of redundancy and the redundancy did not comply with the law and was therefore unfair and awards him and orders the Respondents to pay him

- a. 6 months wages as compensation    Kshs 60,000/-

69.The heads of claim for accrued leave, pay in lieu of notice and overtime are dismissed.

70.Costs do not follow the event in the Employment and Labour Relations Court. Claimant to have costs of Kshs 20,000/-.

**Delivered, dated and signed in Nakuru on this 24<sup>th</sup> day of April 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Maragia instructed by Magatta & Co. Advocates

For Respondent Mrs. Kairo instructed by Sheth & Wathigo Advocates

Nixon Court Assistant