



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 393 OF 2012

CHARLES OPATI OGEYO.....CLAIMANT

VERSUS

W.E. TILLEY (MUTHAIGA) LTD 2011.....RESPONDENT

JUDGMENT

1. The Claimant filed his suit against the Respondent on 12th March 2012 seeking reliefs against the Respondent in respect of work done for the Respondent in Tanzania. He averred that he was employed by the Respondent on 1st May 2008 and posted to Tanzania to construct a new factory called Marmo E Granito Mines Ltd. He averred that he worked for some time in Tanzania and got injured while at work and his immigration status became an issue as the Respondent failed to renew his work permit or pay his allowances. He averred that he was forced to write a resignation letter under duress on 8th December 2011. He thus claimed house allowance, hardship allowance, medical allowance, leave pay, severance pay at the rate of 2.5 months for each year worked, maximum compensation and general damages of 10,560,000/- making a grand total of Kshs. 12,668,000/-. He sought declarations that the actions of the Respondent in failing to process his work permit amounted to modern day slavery and servitude in a foreign land, that the failure to give the Claimant terms and conditions of service was unlawful and the Respondent be fined Kshs. 100,000/- and committal to civil jail for 2 years, that failure to issue a certificate of service was unlawful and the Respondent be fined Kshs. 100,000/- and committal to civil jail for 6 (sic), costs of this Claim.
2. The Respondent filed a Response to the Claimant's Claim on 7th August 2012. In the Response the Respondent averred that it was a stranger to the averments in the Claim and denied the averments in the Claim and put the Claimant to strict proof. It was averred that the Respondent is a limited liability company duly registered in Kenya and all its operations are within the borders of Kenya. It was averred that there was no nexus between the Claimant and Respondent and that the Claimant should have researched well before filing suit to establish who had employed him in Tanzania.
3. The Claimant testified before the Court on 27th May 2014. He stated that he was hired by the Respondent on 1st May 2008 and at the time he did not have a contract. He testified he was hired by Mr. Feroz. The salary was 40,000/- plus allowance for medical and house making a total of Kshs. 59,000/- per month. He stated that after a 2 day journey he arrived in Tanzania and was met by a Mr. Kanti and Mr. Salim who was the manager. He testified that the money was to be paid to his account but he was asked to send someone to collect and at times it would be his brother or his

wife. He worked for 4 years and received food but no medical allowance. He testified that he worked in Mbeya, Tanzania and when he insisted that he wanted to return home he was given fare to go up to Arusha and his brother sent him fare from Arusha to Nairobi. He pleaded his case at immigration at the border and was allowed back home. He expected his dues would be paid which included house allowance, medical allowance of 2,000/- a month. The general damages he sought were for the suffering he went through. He begged to be allowed to come home as he was in a foreign country. He stated that he was told rent for Nairobi would be paid and that he would be given a house allowance. In Tanzania since he was a foreigner they were to give him accommodation and food. He testified that he was surprised that they say he was not an employee of the Respondent. He said that they are the ones who hired him. He testified even the voucher had the name of the Respondent though he was in Tanzania.

4. In cross examination he testified that the voucher for payment was from the Respondent and the account was for Marmo Granito Mines Ltd. He maintained he was to work for the Respondent. He denied lying to the immigration department when he took the permit. He testified that he was received in Tanzania by Salim a manager who is a brother to the manager here in Kenya. Salim was the manager of Marmo E Granito Ltd. He testified that he was hurt and taken to Mbaliza Hospital Mbeya and the bill was paid for. The Respondent was advised by phone from Tanzania and he was discharged which shows money was sent from Nairobi. He testified it was from the Respondent. He stated that he complained a lot and when challenged to produce the evidence of the complaints he testified that he complained orally. He denied that he was employed by Marmo Granito Limited.
5. In re-exam he testified that the Respondent asked him to get the permit and used it to travel to Tanzania. He testified that the voucher referred to W. E Tilley and the cheque referred to W. E Tilley and that everything was sorted out on instructions from Kenya.
6. The Respondent called Tarsisio Maina Irungu who is the Human Resources Officer of the Respondent since 2003. He testified that the Respondent is a fish processor and exporter of fish. He testified the operations of the Respondent do not extend to Tanzania. He referred to the Claimant's voucher in the Claimant's Supplementary Documents and stated that the voucher is from the Respondent on account of Marmo Granito Mines Ltd. It is a company in Tanzania and the directors are brothers to W. E. Tilley directors. He testified there are other sister companies in Uganda and Tanzania and that when one company pays for another company it is normally accounted for separately. The money can be settled against the debts of the other company. He testified that the Claimant has never been an employee of the Respondent. He referred to the list of documents filed by the Respondent and stated that the Claimant's name does not appear on the list of the Respondent's employees. He testified that the cheque payment voucher was for Marmo E Granito Mines Ltd for Charles Opati salary up to December 2011.
7. In cross examination he testified that the Articles and Memorandum of association do not go beyond what is licenced by Nairobi City County. He testified that when they want to do another business they register another company and they had registered another company in Tanzania and the directors are not the same. He testified there is an arrangement on payments but there is no arrangement on employees. He testified that the payments were made on instruction from Marmo E Granito Mines Ltd but he did not have the memo authorising the payment. He testified that each of the employees of the Respondent have contracts. He denied that the Claimant was an employee of the Respondent and that the Claimant knew the instructions to pay were from Tanzania.
8. Parties were to file submissions and as the time of writing this Judgment only the Claimant had filed submissions. In his submissions filed on 12th June 2014, the Claimant submits that the issues for determination are:
 - 1). Whether the Claimant was the Respondent's employee
 - 2). Whether the resignation of the Claimant was constructive dismissal from employment

- 3) Whether the Respondent followed the guidelines set out in the Employment Act in so terminating the employment services of the Claimant
- 4). Whether the reason(s) for termination of the Claimant's employment were justified and whether the same were fair.
- 5). What remedies are available to the Claimant
9. The Claimant submitted on foreign contracts of service under Part XI of the Employment Act and the Employment (Foreign Contracts of Service) Rules 1977. It was submitted that it was clear from the evidence that the Claimant was an employee of the Respondent either directly or as an agent. The Claimant submitted that the termination of his employment was against the dictates of the law and the safeguards under Sections 41 and 43 of the Employment Act 2007 and the termination was unlawful under Section 45. He thus sought a determination that the termination was unfair within the meaning of the law and he was therefore entitled to compensation in terms of Section 49 of the Employment Act. He claimed leave as well as damages and for the damages sought he relied on the case of **Kenya Airports Authority v Silas Obengele [2008] eKLR**. Reliance was also placed on the case of **Southern Highlands Tobacco v Mc Queen (1960) EA 490** and **Joseph Sitati Nato v Kenya Ports Authority [2010] eKLR**. He submitted that he had proved he was constructively dismissed and entitled to the prayers in his claim.
10. The Claimant's case is that he was an employee of the Respondent and was constructively dismissed. He testified that he was employed on 1st May 2008 and posted to Tanzania to work at Marmo E Granito Mines Ltd in Mbeya, Tanzania. A foreign contract of service is subject to the provisions of Part XI of the Employment Act 2007. Part XI provides as follows:-
83. A foreign contract of service shall be in the prescribed form, signed by the parties thereto, and shall be attested by a labour officer.
84. A foreign contract of service shall not be attested unless the labour officer is satisfied?
- (a) that the consent of the employee to the contract has been obtained;
- (b) of the absence of any fraud, coercion or undue influence, and any mistake of fact, or misrepresentation which might have induced the employee to enter into the contract;
- (c) that the contract is in the prescribed form;
- (d) that the terms and conditions of employment contained in the contract comply with the provisions of this Act and have been understood by the employee;
- (e) that the employee is medically fit for the performance of his duties under the contract; and
- (f) that the employee is not bound to serve under any other contract of service during the period provided in the foreign contract.
- 85.(1) When the employer who enters into a foreign contract of service does not reside or carry on business within Kenya, the employer shall, or where the employer resides in Kenya, the labour officer may require the employer to, give security by bond in the prescribed form, with one or more sureties resident in Kenya and approved of by the labour officer for the due performance of the contract in such sums as the labour officer considers reasonable.
- (2) Where the employer has an authorised agent resident in Kenya, the Minister may require that the security bond specified in subsection (1) be given by the agent and the agent shall personally be bound by the terms of the bond notwithstanding the disclosure of his principal.

11. The Claimant has no contract of service and if indeed he was hired to work in Tanzania then he ought to have obtained a contract in terms of Section 83 and 84 of the Employment Act. It is apparent from the evidence adduced and the documentary evidence available to Court that the Claimant worked for a company known as Marmo E Granito Mines Ltd in Tanzania. The Respondent made payments of salary to the Claimant and his dependents on some occasions and the documents show clearly the payments were on behalf of the company in Tanzania. This was admitted by the witness for the Respondent. The records show the Claimant was not an employee of the Respondent at the material times. He thus has no valid claim against the Respondent who had what appears to be a *hawala* system of payments.

12. As to the issues framed. The answers are as follows. As to whether the Claimant was the Respondent's employee, the answer is no. As to whether the resignation of the Claimant was constructive dismissal from employment the answer is no. He resigned and there was no constructive dismissal. As to whether the Respondent followed the guidelines set out in the Employment Act in so terminating the employment services of the Claimant, the answer is that the Respondent did not terminate the services of the Claimant. As to whether the reason(s) for termination of the Claimant's employment were justified and whether the same were fair, there was no termination of employment and thus the issue does not arise. As to what remedies are available to the Claimant, there are none.

13. The upshot of the foregoing is that the suit against the Respondent is dismissed as it does not disclose any cause of action against the Respondent. The parties are each to bear their own costs.

Orders accordingly.

Dated and delivered at Nairobi this 31st day of July 2014

Nzioki wa Makau

JUDGE