IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 70 OF 2014

BETWEEN

CHEMELIL SUGAR COMPANY …….…… APPELLANT

AND

EBRAHIM OCHIENG OTUON ……..1ST RESPONDENT

ROBERT OSERO NYAKUNDI ……2ND RESPONDENT

PHILIP ANYIEGO GAYA ……3RD RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisumu (Wasilwa, J.) dated 30th April, 2014

in

INDUSTRIAL CAUSE NO. 15 OF 2013)

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JUDGMENT OF THE COURT

1. This is an appeal from the Judgment of the Industrial Court (H. Wasilwa, J.) delivered on 30th April 2014 awarding the 48 respondents varying amounts of house allowance ranging between Kshs. 52,846.56 and Kshs. 208,650.78 all totaling Kshs. 5,896,617.48.

Background

2. In their memorandum of claim presented to the Industrial Court at Nairobi on 19th September 2011 in Industrial Case No. 1579 of 2011 (subsequently transferred to Industrial Court, Kisumu, and assigned Case No. 15 of 2013), the respondents, on behalf of 53 former employees of the appellant, complained that the appellant unlawfully and illegally terminated their employment on or about 3rd August 2011. They sought judgment for salaries in lieu of notice, severance pay, unpaid leave, travel allowances and house allowances.

3. In its memorandum of defence, the appellant pleaded that the respondents were employed as casual labourers on various dates and in different capacities; that in July 2011 the appellant embarked on disengagement of casual employees from its factory as part of restructuring due to its poor performance, and informed the District Labour Office of the intended disengagement of casual employees; that the terminal dues payable to the respondents were calculated and paid; and that the termination of the respondents' employment was lawful and fair.

4. The hearing of the dispute commenced before H. Wasilwa, J. with testimony of Ibrahim Ochieng Othuon who testified on behalf of the respondents that he was an employee of the appellant between November 2003 and August 2011 as a mechanical fitter; and that he turned up for work one morning in August 2011 and was informed that he was no longer in employment. At the end of his evidence in chief, the learned Judge stayed proceedings and referred the parties to the County Labour Officer for conciliation under Section 15(4) of the Industrial Court Act.

5. The dispute between the parties was substantially resolved through that conciliation process. The only issue that remained for determination by the court was the issue of house allowance. On 28th February 2014, the parties recorded a consent order before the Judge in these terms:

"*By consent*

1. ***All the 53 claimants were bona fide employees of the respondents and after withdrawal of 5, there are 48 claimants remaining.***

2. ***All the 48 claimants were terminated on the 10th of August 2011.***

3. ***On terminal dues is agreed as per an attached schedule dated 28.2.2014.***

4. ***The sticky issue of house allowance to be determined by the court*."**

6. In their written submissions before the lower court on the outstanding issue, the appellant submitted that the respondents are not entitled to the claim for house allowance and that the same should be dismissed; that the respondents were paid consolidated wages inclusive of house allowance; that by reason of the wages paid to the respondents having been above the minimum statutory wage they were consolidated wages; that the respondents were not members of a trade union and did not enjoy the terms and conditions of a collective bargaining agreement; that the respondents could only claim arrears for the last twelve months being the period when evidence is admissible where proceedings are brought under Section 48(2) of the Labour Relations Act, 2007; that in any event, an employer is only required to keep records for a period of three years and calculations for house allowance could only be based on the earnings for each year for the preceding three years; and that calculation of house allowance on that basis is justified, fair and based on law as the respondents "*were not entitled to arrears for the entire period that they worked*."

7. On their part, the respondents submitted before the lower court that the respondents are entitled to house allowance pegged on 15% of the total monthly income for all the years that the respondents worked, as opposed to three years as submitted by the appellant; that it was incumbent on the appellant to establish that it paid the respondents a consolidated salary that was inclusive of house allowance; alternatively the appellant should have provided the respondents with housing,absent which the respondents' claim stands.

8. In her Judgment, the learned Judge held that the issue of house allowance is addressed in Section 31 of the Employment Act. She found that the "*contracts of service of the claimants did not provide a consolidated sum as part of the basic wage or salary as an element intended to be used by the employee as rent*" and that "*each claimant is entitled to payment of house allowance*".

9. The Judge rejected the appellant's argument that the claim for arrears should be limited to three years, being of the view that calculation of terminal benefits is based on all years worked. The Judge concluded her Judgment thus:

"I find that the claimants are entitled to payment of their house allowance at 15% for each month for all the time they have worked. The parties have already agreed on the period during which each claimant worked and this was the basis upon which the consent of 28.2.2014 was made. Based on this calculation, I allow and order that the claimants be paid house allowance as per the Scheduled prepared by the claimants and filed in court on 25.3.2014 …"

10. Aggrieved, the appellant instituted this appeal.

The appeal and submissions by counsel

11. The appellant set out six grounds of appeal in its memorandum of appeal that were canvassed before us by Mr. D. M. Ouma, learned counsel. According to Mr. Ouma, the learned Judge should have found that the respondents were paid a consolidated salary had she taken into account the fact that their wages were above the minimum statutory wage prescribed under the Regulation of Wages (General) Order; that there was no contract of service on the basis of which the Judge's finding could be supported; that even though the respondents had contended that they were members of a trade union, there was no evidence that they contributed union dues; that the Judge should have heeded the finding of the conciliator that the respondents were not entitled to house allowance; that in any event the amounts awarded to the respondents as house allowance were unilateral figures furnished by the respondents without input or interrogation by the claimant.

12. Opposing the appeal, Mr. K. Omondi, learned counsel for the respondents, urged that the appeal is founded on the faulty premise that the respondents were casual workers when in fact they were not; that even though the employment of the respondents may have commenced on casual basis, the employment converted from casual employment to term contracting by operation of Section 37 of the Employment Act; that the Regulation of Wages (General) Order is not applicable to the respondents because it does not apply to workers in the agricultural industry such as the respondents; and that the amounts awarded as house allowance were based on records provided by the appellant and there is therefore no basis for interfering with the decision of the lower court.

Determination

13. We have considered the appeal and submissions by learned counsel. The only issue for our consideration is whether the finding by the learned Judge that "*each claimant is entitled to house allowance"* is well founded. One of the grounds on the basis of which the appellant has attacked that finding is that the respondents were casual employees who were not entitled to house allowance. The undisputed facts were that the respondents worked for the appellant in various capacities for periods ranging between one year and fifteen years. Even if the

respondents may have commenced employment with the appellant as casual employees, their terms were converted to term contracts by operation of law under Section 37 of the Employment Act, which provides that:

"(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more,

the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act."

14. Those provisions are self-explanatory. The respondents' employment with the appellant were automatically converted into term contracts by operation of that provision. The contention by the appellant that the respondents were casual employees when their employment was terminated and were for that reason not entitled to house allowance is therefore incorrect. Furthermore, the appellant's contention runs counter to the consent order recorded by the parties before the Judge referring the matter of house allowance for adjudication by the Judge, whereby the parties expressly acknowledged that all 53 respondents "*were bona fide employees*" whose employment was "*terminated on the 10th of August 2011*"

15. As for the assertion that the salaries paid by the appellant to the respondents were consolidated salaries inclusive of a component of house allowance, the burden lay with the appellant to so demonstrate before the lower court. It did not.It contended that it paid the respondents wages above the minimum wages prescribed under the Regulation of Wages (General) Order made under the Regulation of Wages and Conditions of Employment Act; that by that fact alone, it must be construed that the salaries were consolidated. However, as indicated by counsel for the respondents, that Order specifically provided that it "*shall not apply to workers in the agricultural industry*" quite apart from the fact that, there was no provision therein to support the argument that payment above minimum wage must necessarily mean that it incorporates an element of house allowance. There is therefore no merit in that argument.

16. As for the argument that the Judge adopted erroneous figures presented to court by the respondents, it is clear from the record that all terminal benefits were computed on the basis of figures obtained from the appellant as the employer. The house allowance was computed on the basis of 15% percent of the monthly wages. Consequently, as there was no issue what the monthly wages for each employee was, it was possible to compute the amount due as house allowance for each employee. Indeed the only contention at the time by the appellant was that it was required to maintain records for up to three years only, and that the obligation to pay the house allowance arrears should not have been for a period longer than three years. The argument that the Judge adopted unilateral figures supplied by the respondents is therefore devoid of merit.

17. For those reasons, the appeal lacks merit. It is dismissed with costs to the respondents.

Dated and Delivered at Kisumu this 20th day of November, 2015.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

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DEPUTY REGISTRAR