



Case Number:	Cause 2262 of 2015
Date Delivered:	20 Jul 2017
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Ruling
Judge:	Monica Mbaru
Citation:	Rajab Barasa & 4 others v Kenya Meat Commission [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2262 OF 2015

RAJAB BARASA1ST CLAIMANT

JOHN MUTWIRI GICHURU2ND CLAIMANT

MARTIN MONO3RD CLAIMANT

VINCENT AKARAH4TH CLAIMANT

BETH SILAS5TH CLAIMANT

VERSUS

KENYA MEAT COMMISSIONRESPONDENT

RULING

1. The respondent, Kenya Meat Commission by application dated 2nd May, 2017 and seeking for orders that;

a) The court directs the 2nd, 3rd and 4th respondents [claimants] to vacate the applicants [respondent] premises forthwith.

b) In the final hearing and determination of this application the court do order that the OCS Athi River Police Station to effect the orders the applicant herein in the execution and eviction of the 2nd, 3rd and 4th respondent from the applicants premises.

c) Costs of this application be provided for.

2. The application is supported by the annexed affidavit of Annie Kamau, company secretary of the respondent and on the grounds that the claimants contract of employment with the respondent have since expired and no longer binding on the respondent as former employees of the respondent, the claimants continue to stay in the premises of the respondent without authority, permission.

3. On 28th July, 2016 the 4th claimant wrote and requested the respondent to lease extension to December, 2016. The request was declined. It is therefore in the interests of justice that the orders sought be issued by the court.

4. In the list of authorities filed by the respondent they rely on **Nancy M mwongera versus Board of Governors & Another [2010] eKLR; Richard Were & 11 others versus Permanent Secretary Ministry of health & 3 others [2013] eKLR; Eric J Makokha versus Lawrence Sagini & 2 other [1994] eKLR; and East African Railways Corporation versus Karangi [1988] eKLR.**

5. In reply, the claimants filed Replying Affidavit sworn by the 4th Claimant and who avers that the respondent has come to court with unclean hands as they have failed to comply with orders issued on

16th May, 2016 requiring payment of terminal dues to the claimants. The recruitment of new employees while the claimants were in office was unlawful and unprocedural and this court is yet to commence the substantive hearing of the main claim for a final determination.

6. Mr Akarah also avers that in the ruling of 16th March, 2016 the court directed the respondent to pay all due salaries, benefits and allowances owing to each claimant at the lapse of each contract of employment. In disregard of these orders that respondent has not paid for leave days due, mileage claims, leave allowances and gratuity. Despite clearing with the respondent, the terminal dues owing to the claimants have not been paid.

7. The respondent has frustrated the clearance process so as to frustrate the claimants.

8. Mr Akarah also avers that the fact that the claimants are no longer working for the respondent does not disentitle them to the respondents housing while waiting for their terminal dues considering the circumstances of this case. The respondent has 688 houses and most tenants are not the employees of the respondent. There are 289 non-staff tenants.

9. The claimants rely on the case of **Max Masoud Roshankar & another versus Sky Aero Limited [2015] eKLR**.

Determination

10. On the orders sought by the respondent that the claimants be ordered to vacate their premises or be evicted, the claimants in reply assert at paragraph 3 and 9 of Mr Akarah Replying Affidavit as follows;

3. I believe that the respondent has come to court with unclean hands as it has not complied with the honourable court's orders of 16th March, 2016 requiring it to pay myself and my co-claimants our terminal dues.

9. ... I verily believe that the fact that the claimants are no longer working for the respondent does not disentitle them to the respondent's housing while they are awaiting payment of their terminal dues considering the circumstances of this case. ...

11. With this confirmation by the claimants in reply to the respondents application, where there are orders of the court that the respondent has failed to comply with, there is procedure on how such should be addressed. The claimant cannot refuse, fail and or insists on taking up the respondent's premises on the grounds that terminal dues have not been paid.

12. Where the respondent has failed to pay any lawful dues owing to the claimants, once adjudged, there is a remedy. Such remedy cannot be found by the claimant by failing to vacate the respondent premises. Such cannot be a good basis to assert an employee's rights which is due or is anticipated. Such would negate fair labour relations between an employer and employee.

13. The claimants cannot make the occupation or requirement to vacate from the respondent premises conditional and subject to payment of terminal dues. The houses the claimants occupy are the property of the respondent to be allocated by the respondent. Such cannot be unlawfully usurped or held as lien for any debt due or anticipated in the future by the claimants.

14. Reference by the claimants to the case of **Max Mansound Ronshankar** I hereby found distinguishable. The facts leading to that case as set out by the court are different from facts herein. The

claimants cannot equate their circumstances to those of the cited case. In principle, where an employee is terminated under the provisions of section 40 of the Employment Act, 2007 the law is clear that such an employee should be paid part of the terminal dues in cash. The cause of action for the claimants herein is yet to be urged and a finding made. As such, the principle upon which the claimants seek to rely upon is lost.

15. Upon the lapse of the claimant's contract of employment with the respondent, the respondent was at liberty to recover possession of its premises. See **Nancy Mwongera versus Board of Governors, Salvation Army Thika High School for the Visually Challenged Persons [2010] eKLR.**

16. Where the main claim is heard and the claimant are able to proof that there is a due claim for accommodation by the employer and or an allowance is due thereof, such must be addressed at that point. Pending such proof and judgement, the claimants continue to occupy the respondent premises without permission, authority and the orders sought shall issue.

Application dated 2nd May, 2017 is hereby allowed and orders as follows;

(a) The claimants shall forthwith vacate respondent premises and not later than the next 24 hours unless with the permission and authority of the respondent;

(b) For the unauthorised period of occupation, where a charge is due and unpaid such is payable within seven (7) days;

(c) Failure to vacate and render vacate possession as directed at (a) above, the respondent shall source the assistance of the OCS Athi River Police station and the costs attendant thereto shall be met by the claimants;

(d) Costs of the application to the respondent.

Dated and delivered in open court at Nairobi this 20th day of July, 2017.

M. MBARU

JUDGE

In the presence of:

Lilian Njenga and David Muturi – Court Assistants

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