

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CAUSE NO 123 OF 2017

CHARLES NGANGA KARIUKI.....CLAIMANT

VERSUS

SANLAM INSURANCE COMPANY LIMITED

(FORMERLY PAN AFRICA INSURANCE).....RESPONDENT

JUDGMENT

1. The Claimant sued his former employer as a unit manager and averred that he later was promoted to the position of branch manager earning Kshs. 998,000/- as at February 2016. He averred that he was taken through a circus by the Respondent in the name of a disciplinary hearing culminating in his dismissal on allegations he termed mere allegations actuated by malice, ill will and suspect motive. He averred that his dismissal was unlawful, unfair, unwarranted and illegal. He averred the dismissal was accused of misdeeds and blame heaped on him without him being served with a copy of the report. He averred that while in employment he never breached his terms of his employment. He thus sought to recover for his dismissal in April 2016 and specifically sought a declaration that the dismissal was contrary to his rights to fairness and fair labour relations as provided for under Article 50 of the Constitution and the Employment Act, damages for wrongful dismissal equivalent to 12 months, aggravated/exemplary damages for the mental anguish suffered by the Claimant and his family, an order for issuance of a certificate of service, costs of the suit and interest at court rates.

2. The Respondent filed a motion in response to the claim seeking to have it referred to arbitration ostensibly on account of the contract between the parties. The Respondent asserted that the suit should be stayed pending arbitration and the court was notified in course of proceedings that parties were engaged in arbitration. After the matter was mentioned a few times it was indicated that the arbitrator was seeking extortionist fees and was ordered to present his report to court and upon declining to do so the court vacated the arbitration proceedings and ordered the matter to proceed. The Respondent did not file a defence but participated in the hearing that ensued by cross-examining the Claimant. It asserted that it had a right to challenge the jurisdiction of the court.

3. Jurisdiction is everything, without it a court can do nothing. In the case of **The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited (1989) KLR 1** Nyarangi JA famously stated thus:-

"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

Similarly in the case of **Owners and Masters of The Motor Vessel "Joey" v Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2007] eKLR** the Court of Appeal {Omolo JA, Tunoi JA (as he then was) Githinji JA} expressed itself as follows:-

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

4. Under Section 75 of the Labour Relations Act 2012, the Arbitration Act (Act No. 4 of 1995) shall not apply to any proceedings before the Industrial Court. The Industrial Court has since been renamed the Employment and Labour Relations Court. As this section has never been challenged the Arbitration Act of 1995 is excluded in proceedings before this court and therefore the assertions by the Respondent that the court has no jurisdiction were contra statute and clearly misplaced. As there is jurisdiction the court renders its judgment in the matter.

5. The Claimant testified that he was engaged as a unit manager by pan Africa Insurance at the time before it changed its name to Sanlam and based at Thika. He stated that he served with diligence and later in 2016 he was appointed a branch manager and he was specifically tasked with revival of a failing branch, Nyeri before he was recalled to revive Thika branch. He stated that the management decided to change the pay structure in 2016 and the delay in replying to the request by the head office was on account of a colleague whose father had passed away and therefore was out of the office. He testified that his efforts were directed at trying to revive the flagging branch and he had delayed in submitting the contracts on account of the colleague whose father had died. He stated that he was asked to report to a gentleman Jael Ocheing

but he sought indulgence of the CEO to allow him report to Francis Ogwel. He asserts that he was called for a hearing which was geared to terminate his contract and that he was targeted for dismissal. He testified that he was hounded off from his office and that he was entitled to the relief sought. In cross-examination he stated that the contract had an arbitration clause and that the arbitrator did not honour the directions given by the court and the court record was clear as to how the matter was handled. He stated he did not give directions on the matter and that there was a breakdown given on the fees the arbitrator sought. He stated that he served the arbitrator and the Respondent and the issues were not clarified. That marked the end of the oral hearing and the Claimant stated he would not file submissions as what he had before the court was sufficient. The Respondent stated it too would not file submissions on account of want of jurisdiction.

6. The Claimant had a contract which was exhibited before the court. The contract from a plain reading of it was a contract for service and not a contract of service. The contract was *strictu sensu* not employment in nature but made the Claimant an independent contractor. He was therefore paid a commission not a salary and there was no employer employee relationship created. He was an agent of the Respondent and not employee as the contract clearly set out. He paid withholding tax and not the statutory deductions employees pay each month such as NSSF and NHIF. Whereas the court is imbued with jurisdiction to hear and determine the matter of employment, the dispute the Claimant framed should have been directed as a commercial dispute. The suit before the court was therefore in the wrong forum and I accordingly strike it out with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 11th day of December 2019

Nzioki wa Makau

JUDGE