



Chabari v Sanlam Life Insurance Limited (Formerly Pan Africa Life Assurance Limited) (Cause 452 of 2013) [2024] KEELRC 887 (KLR) (24 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 887 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 452 OF 2013**

**L NDOLO, J
APRIL 24, 2024**

BETWEEN

STEPHEN CHABARI CLAIMANT

AND

SANLAM LIFE INSURANCE LIMITED (FORMERLY PAN AFRICA LIFE ASSURANCE LIMITED) RESPONDENT

JUDGMENT

1. The Claimant filed a Memorandum of Claim dated 2nd April 2013, seeking relief for unfair termination of employment. The Respondent filed a Memorandum of Defence and Counterclaim dated 2nd July 2013.
2. By an order dated 16th April 2018 issued by D.K.N Marete J, the Claimant's claim was dismissed for want or propection. The Respondent however elected to prosecute its Counterclaim, hence this judgment.
3. In support of its Counterclaim, the Respondent called two witnesses; Stephen Njenga and Susan Kakai. The Respondent also filed written submissions.

The Counterclaim

4. The Respondent states that the Claimant was first employed as a Clerk, rising through the ranks to the position of Accounts Assistant at the time of termination of his employment.
5. According to the Respondent, the Claimant's duties included bank reconciliation, preparation of cheques and maintenance of stale cheques register.
6. The Respondent states that during the period of his employment, the Claimant owed the following fiduciary duty:



- a. A duty to act in good faith and in the best interest of the Respondent;
 - b. Duty not to act for a purpose in conflict with the purposes for which he was employed; and
 - c. A duty not to act so as to place himself in a position in which his personal interests would or could conflict with the interests of the Respondent.
7. The Respondent further states that the Claimant, as its employee owed a contractual duty to:
- a. Devote his full attention to the interests of the Respondent during business hours;
 - b. Act with propriety in the use of the Respondent's resources and in the handling and use of the Respondent's funds;
 - c. Not to use the Respondent's property for personal gain;
 - d. Not to have a personal interest or potential for gain in any company transaction;
 - e. Not to engage in any activity that would interfere with his performance or responsibilities or would otherwise conflict with or be prejudicial to the Respondent.
8. The Respondent accuses the Claimant of deliberately breaching his duty with the aim of deriving personal gain and/or benefitting third parties with whom the Respondent did not have a relationship as a result of which the Respondent suffered loss.
9. The Respondent accuses the Claimant of participating in a fraudulent scheme under which:
- a. Fictitious cheque replacement requests would be raised;
 - b. The Claimant would falsely assert that cheques that had previously been issued by the Respondent to genuine policy holders were stale and outstanding;
 - c. The Claimant would thereafter issue payment vouchers in the names of fictitious policy holders;
 - d. Monies would thereafter be processed and paid out to fictitious policy holders, either by cheque, MPESA mobile money transfer or electronic funds transfer.
10. The Respondent states that in the above mentioned scheme, the Claimant directly initiated 51 fraudulent payments and caused 11 other payments to be initiated by Ms. Zubeida Yusuf, a casual labourer who was working directly under his instruction. The Respondent claims that out of the fraudulent payments, 55 went through while 7 were unsuccessful.
11. The Respondent's case is that through the 55 payments referred to above, a total sum of Kshs 2,496,513.80 was fraudulently paid out to persons who were unknown to the Respondent.
12. The Respondent therefore claims to have suffered loss of Kshs 2,496,513.80 through fraudulent payments initiated by and at the behest of the Claimant. The Respondent now claims the said sum of Kshs 2,496,513.80 from the Claimant.
13. The Respondent admits that it owes the Claimant the sum of Kshs 23,780.40 being the Claimant's final dues in respect of leave pay for 18 days.
14. The Respondent avers that pursuant to Section 19(1)(d) of the *Employment Act*, it is entitled to set-off the amount owed to the Claimant against the counterclaim. On account of the set off the Respondent counterclaims the difference being, Kshs 2,472,733.40 from the Claimant.



Determination

15. The Respondent's claim against the Claimant arises from an alleged loss as a result of fraudulent payments involving the Claimant. This claim falls within the purview of special damages and as held by the Court of Appeal in *Hahn v Singh* [1985] KLR, special damages must be specifically pleaded and proved. This requirement subsists even in an undefended claim such as the present one.
16. In advancing its case, the Respondent relies on an investigation report prepared by Hawk Eye Technologies. The report dated July 2011, implicates the Claimant and one Charles Nyaga in the loss of Kshs 2,496,513.55. The report has several appendices including:
 - a. Copy of stale cheque replacement request;
 - b. Copy of cheque dated 9th February 2007 in favour of Raphael K. Rono;
 - c. Amended list of payees;
 - d. List of all fictitious payees;
 - e. List of fictitious payees where:
 - i. Files are available;
 - ii. Files are not available;
 - iii. There is no documentation.
 - f. Copy of staff beneficiary nomination form;
 - g. Copies of payment printouts;
 - h. Copies of scanned cheques indicating date of clearing, bank & branch;
 - i. Copies of EFT payment confirmation from Stanchart.
17. A review of the documents availed by the Respondent in support of its counterclaim reveals the following:
 - a. The alleged loss of Kshs 2,496,513.55 is not supported by primary documents showing the payment flow;
 - b. The payment vouchers said to have been prepared by the Claimant do not bear his signature;
 - c. Some of the payment vouchers do not disclose the name of the person who prepared them;
 - d. There is no documentation linking the Claimant to the alleged fictitious payments.
18. In the result, I find and hold that the Respondent has not proved its counterclaim to the required standard. The counterclaim therefore fails and is dismissed.
19. I make no order for costs.

DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF APRIL 2024

LINNET NDOLO

JUDGE

Appearance:



No appearance for the Claimant

Mr. Mitto for the Respondent

