



**Mboya v AIG Kenya Insurance Co. Ltd (Employment and Labour Relations Cause E854 of 2021) [2023] KEELRC 2261 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2261 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E854 OF 2021  
BOM MANANI, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**JOSEPHAT MUINDI MBOYA ..... CLAIMANT**

**AND**

**AIG KENYA INSURANCE CO. LTD ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The Claimant was an employee of the Respondent until 31<sup>st</sup> August 2021 when the employment relationship between them came to a close. From the evidence that has been tendered, the parties terminated the employment relation through a Settlement Agreement which was executed between them in early August 2021.
2. The Claimant states that the said agreement was procured through coercion. Therefore and in his view, their separation was unlawful.
3. Further, the Claimant contends that the employment agreement that he signed on 18<sup>th</sup> November 2011 does not recognize mutual separation as one of the ways through which the employment relation between the parties could be brought to a close. Therefore and in his view, the purported separation of the parties through mutual separation was unlawful.
4. The Claimant also states that the Respondent instituted disciplinary proceedings against him towards the close of July 2021 only for the said proceedings to be withdrawn moments before he was asked to execute the Settlement Agreement in early August 2021. Thus, the Claimant asks the court to find that institution of the aforesaid case against him was intended to exert undue pressure on him to sign the Settlement Agreement.



5. On the other hand, the Respondent admits that it instituted disciplinary action against the Claimant in July 2021. The Respondent however avers that the parties later agreed to abandon this process in favour of mutual separation.
6. The Respondent denies that the Claimant was coerced into signing the settlement agreement. According to the Respondent, the Claimant demanded that the Respondent withdraws the disciplinary case against him before they could negotiate their mutual separation.
7. Following this demand, the Respondent states that it wrote to the Claimant in early August 2021 withdrawing the disciplinary process against him. The parties then negotiated mutual closure of the employment relation whereupon a draft separation instrument was prepared and shared with the Claimant through his email address.
8. The Respondent states that the Claimant agreed to the terms of the agreement and voluntarily signed it in the presence of his witness who attested his signature. The Respondent further avers that the Claimant was paid the settlement amount in the agreement thereby closing the matter.
9. Having regard to these factors, it is the Respondent's case that this claim is unmerited. Accordingly, the Respondent prays that the case be dismissed with costs.

### **Issues for Determination**

10. Having considered the pleadings and evidence on record, the following appear to be the issues for determination: -
  - a. Whether the separation of the parties was lawful.
  - b. Whether the parties are entitled to the reliefs that they seek through their pleadings.

### **Analysis**

11. The record shows that prior to the parties entering into the Settlement Agreement, the Respondent had commenced disciplinary action against the Claimant. There is evidence that the Claimant had been issued with two notices to explain why disciplinary action should not be taken against him for alleged infractions at work. There is evidence that the Claimant had responded to the notices aforesaid and had been summoned to a disciplinary meeting.
12. There is also evidence that before the disciplinary session happened, the parties opened negotiations on alternative approaches to resolving the dispute between them. There is evidence of email exchanges between the Claimant and the Respondent by which the Respondent offered to withdraw the disciplinary cause and have the parties mutually separate.
13. There is evidence that when the Claimant was engaged on this approach, he demanded the unconditional withdrawal of the disciplinary case against him before he could engage the Respondent on the issue. The email exchanges happened between 2<sup>nd</sup> August 2021 and 3<sup>rd</sup> August 2021. Extracts of these emails were tendered in evidence.
14. There is evidence that the Respondent wrote to the Claimant dropping the disciplinary case against him. There is also evidence that the Claimant was then sent a draft of the Settlement Agreement.
15. There is evidence that on 2<sup>nd</sup> August 2021, the Respondent sent the Claimant an email through which it shared with the Claimant a breakdown of the proposed payments to him. There is evidence that on 3<sup>rd</sup> August 2021, the Claimant sent an email to the Respondent questioning computation of the proposed payments to him under the agreement.



16. In his evidence before court, the Claimant admitted that he signed the Settlement Agreement whilst at his house since he was working from home. The Claimant further confirmed that he signed the agreement in the presence of his friend who acted as his witness. The Claimant further confirmed that the said witness attested his (the Claimant's) signature. The Claimant confirmed that his attesting witness was not an employee of the Respondent.
17. Further, the Claimant confirmed that after signing the agreement, he scanned a copy and sent it to the Respondent through email. He stated that he thereafter sent to the Respondent the hard copy of the instrument through a courier service provider.
18. The Claimant confirmed that he was paid the amounts agreed in the Settlement Agreement. He also confirmed having received his pension dues.
19. Although the Claimant asserts that the Settlement Agreement was procured through coercion, he did not provide evidence to support this assertion. Apart from insinuating that the events that preceded the signing of the agreement suggest coercion, there was no cogent evidence to prove his assertion that his signature on the instrument was procured through force or undue influence.
20. On the contrary, the email exchanges between the parties before the Settlement Agreement was executed point to free interaction between the parties over the content of the instrument. Further, the fact that the Claimant signed the instrument at his home in the presence of a witness of his choice suggests that there was no undue influence exerted on him by the Respondent.
21. It is critical that the Claimant concedes that he signed the Settlement Agreement in the presence of an independent attesting witness. If the Claimant hoped to establish his claims regarding coercion and undue influence against him, it was necessary that he calls this witness to testify to the allegations. He did not.
22. It is also noteworthy that the Claimant admits that he received the terminal dues that were agreed upon in the Settlement Agreement. As a matter of fact, the Respondent provided proof of payment of the terminal dues.
23. The record shows that payment of the terminal dues was effected towards the end of August 2021 long after the parties had signed the Settlement Agreement. If the Claimant's signature on the instrument was procured through coercion, why did he accept the payments under the instrument?
24. The Claimant's attempts at benefiting from the instrument whilst at the same time assailing its validity is a typical case of approbation and reprobation. This is not permissible in law.
25. A settlement agreement constitutes a binding contract between parties to the agreement. Unless it is set aside on the same grounds as any other contract, it binds the parties.
26. Where a party alleges that an agreement has been vitiated through coercion or undue influence, he has the singular duty to establish this assertion through cogent evidence. He must establish this fact on a standard that is higher than on a balance of probabilities (see *Mwaura v Taxify Kenya Limited* (Cause 173 of 2019) [2023] KEELRC 1849 (KLR)). The Claimant has not discharged this obligation.
27. The Claimant has made an elaborate case about the fact that he was not notified of the reason for termination of his contract of employment and that he was not subjected to a disciplinary process as required under the Employment Act. In his view, this was in contravention of the Employment Act and the various pieces of legislation that he cites.



28. Clearly, the Claimant has misapprehended the workings of the law in this respect. Where parties to an employment contract agree to a mutual separation, there is no obligation on the employer to comply with the procedure prescribed under sections 41, 43, 45 and 47 of the [Employment Act](#). This procedure only applies where the employer takes a unilateral decision to end the employment contract (*Mwaura v Taxify Kenya Limited* (Cause 173 of 2019) [2023] KEELRC 1849 (KLR)).
29. The Claimant also suggests that because the contract of employment between them does not recognize mutual separation as one of the ways through which the parties could close their contract, it was not open to the Respondent to resort to this mechanism to terminate the Claimant's employment. Again, this is a misapprehension of the law in this respect. The fact that the parties did not specifically state in the contract that they could mutually close the contract did not take away their power to mutually close the contract.
30. In the end, I find that the contract of service between the parties was lawfully closed through mutual separation. As such, termination of the Claimant's employment was lawful.
31. Having arrived at the conclusion that the contract of service between the parties was validly terminated, I find that the Claimant is not entitled to the reliefs that he seeks through his Statement of Claim. Conversely, I find that the Respondent is entitled to the prayer that this action be dismissed with costs.

#### **Determination**

32. The upshot is that the court finds the Claimant's suit against the Respondent as lacking in merit.
33. Accordingly, the claim is dismissed.
34. The Respondent is granted costs of the action.

**DATED, SIGNED AND DELIVERED ON THE 29<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**B. O. M. MANANI**

**JUDGE**

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M. MANANI**

