



Ogutu v Madison Group (Madison Life Insurance) (Employment and Labour Relations Cause E928 of 2022) [2023] KEELRC 3409 (KLR) (29 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3409 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E928 OF 2022**

**K OCHARO, J
DECEMBER 29, 2023**

BETWEEN

HENRY AGISO OGUTU CLAIMANT

AND

MADISON GROUP (MADISON LIFE INSURANCE) RESPONDENT

JUDGMENT

1. Claiming that at all material times he was an employee of the Respondent, and whose employment it terminated unfairly and wrongfully, the Claimant sued the Respondent claiming inter alia; a declaration that the termination was unfair, wrongful and illegal, and a compensatory amount of Kshs. 274,937,000.
2. The Respondent resisted the action. The Respondent contended that it did not employ the claimant in the manner he alleges. The relationship between him and it was that where the Claimant could only earn commission anchored on sales made and not monthly salary plus commissions as he asserts. Further, the Respondent posited that the Claimant is not entitled to the reliefs sought or at all.

Claimant's Case

3. The Claimant stated that he first came into the employment of the Respondent in or about June 2022, as a Sales and Marketing Officer. The terms of the contract of employment were inter alia:
 - a. He will earn a salary of Kshs. 30,000/= plus a commission worth 5,000,000/= during the first month of employment.
 - b. He will earn a salary of Kshs.30,000/= plus a commission of Kshs. 10,000,000/= during the 2nd month.



- c. He will earn a salary of Kshs. 30,000/= plus commission worth Kshs. 15,000,000/= during the 3rd month of employment.
 - d. He will be entitled to a salary of up to Kshs. 60,000/= plus a commission of Kshs. 20,000,000/= (Twenty Million) for the fourth month.
 - e. In the fifth month he will be entitled to a salary of Kshs. 60,000/= plus a commission worth Kshs. 25,000,000 (Twenty-Five Million).
 - f. In the 6th month he could be entitled to a salary of Kshs. 60,000/= and a commission of Kshs. 30,000,000/= (Thirty Million).
 - g. On the 7th month he could be entitled to a salary of between Kshs. 80,000/= - 150,000/= plus a commission worth Kshs. 30,000,000 (Thirty Million).
 - h. He will be entitled to a salary of Kshs. 80,000/= - 150,000/= plus a commission worth Kshs. 45,000,000/= (Forty-Five Million) in the 9th month of the employment.
 - i. In the 10th month he could become entitled to a salary of above Kshs. 150,000/= plus a commission of Kshs. 50,000,000 (Fifty Million).
 - j. From the 3rd month to the 6th month of employment he was to have the title, Business Sales Executive, get entitled to medical cover (inpatient Kshs. 300,000/- and Outpatient of Kshs. 50,000/=), and death and disability cover.
4. The Respondent did not pay him the salary and his commission even though he diligently rendered his services to it.
 5. He further stated that he worked for the Respondent from July 2022 to 21st November 2022 when its Thika Branch Manager, Faith Mugo dismissed him from employment without giving him a reason (s) thereof. Further, before the dismissal, he was not accorded any hearing.
 6. Cross-examined by Counsel for the Respondent, the claimant testified that in the first three (3) months of his employment, he worked for the Respondent as a special agent/sales representative. Thereafter, he worked as a Business Sales Executive up until the date of separation.
 7. He further testified that the terms and conditions of his employment were defined under two contracts. The copies thereof were never released to him by the Respondent. At the execution of the documents, he was told that the same were to be forwarded to the Respondent's Headquarters, Nairobi, first before he would be furnished with his copies.
 8. The Claimant testified that he went out for marketing on several occasions, and expended his funds but the Respondent never reimbursed the same. The unreimbursed sum amounted to approximately Kshs. 90,000/=.
 9. The Claimant asserted that he never at any time absconded or failed to attend scheduled meetings. Whenever, for a reason, it was not possible for him to attend any meeting, he could notify his Unit Manager.
 10. The Claimant denied having been a Sales Trainee, initially.
 11. Pressed further, the Claimant testified that he signed an agreement captioned "Sales Trainee Agreement" on the 17th of June 2022. According to the Agreement, he was obligated to secure three insurance proposals of Kshs. 15,000/= each. He only managed to secure two proposals. However, none of them was paid for.



12. He contended that attainment of the three proposals was not a pre-condition for his eligibility to execute an agency contract.
13. He further testified that on the 21st of November 2022, he did not report to work while intoxicated. The Manager did not order him off, to report back when sober.

The Respondent's Case

14. The Respondent presented one witness, Mr. Faith Mugo, its Branch Manager, Thika, to testify in support of its defence against the Claimant's case. The witness urged the Court to adopt the contents of her witness statement filed herein as part of her evidence in chief.
15. The witness stated that the Claimant was not employed by the Respondent as alleged. He was engaged as a Sales Trainee entitled to commission payment on getting the Respondent clients who paid full premiums. Further, the Claimant executed a Sales Trainee Agreement. According to the agreement, he was supposed to secure three proposals to qualify for an agency contract between him and the Respondent. He did not secure any.
16. Cross-examined by the Claimant, the witness stated that on the product called Uni-plan, an agent was entitled to a commission of 35%.
17. The witness insisted that the Claimant's position was that of a Sales Trainee who was supposed to procure clients for the Respondent at a commission. Further, he did not manage to get even a single customer.
18. She further testified that contrary to the Claimant's assertion, she did not write a message to him informing him that he was entitled to a retainer salary of Kshs. 30,000/= per month.
19. The witness stated that the Respondent did not finance all business trips. It only funded those that it directly organized.
20. As the claimant did not make a single sale, he could not be paid any commission. Commissions payable were to be anchored on the sales made. The two proposals that the Claimant secured in his 1st week of service, did not yield any premiums. That claimant could not therefore be paid commissions on them.
21. The witness asserted that the Sales Trainee Agreement could terminate if the Claimant was to get to the level of earning commissions of Kshs. 20,000/= per month, therefore entering "career path". However, he did not reach the level as he never made any sales.

Analysis and Determination.

22. I have carefully considered the pleadings and evidence presented by the parties, and the following issues emerge for determination:
 - a. What was the relationship between the Claimant and the Respondent?
 - b. Is the Claimant entitled to the reliefs sought?

What Was The Relationship Between The Claimant And The Respondent?

23. The Claimant contended that at all material times, he was an employee of the Respondent, serving in various positions, at various times of his tenure. The Respondent vehemently resisted the assertion, contending that the relationship between them was born out of a Sales Trainee agreement. The



Claimant was never an employee entitled to a monthly salary plus commissions but a sales agent entitled to commissions premised on successful insurance and or life assurance sales made.

24. It was the Claimant's evidence that he signed two contracts of employment with the Respondent. This Court notes that surprisingly he failed to tell this court when the contracts were executed. What was the necessity of executing two contracts of employment within five months? What were the terms and conditions of employment embodied in the contracts? These pivotal questions did not get an explanation in the Claimant's evidence.
25. Further, it cannot be difficult for one to conclude that the matter of execution of two contracts by the Claimant was not pleaded in his memorandum of claim. It is a well-worn principle of Law that parties are bound by their pleadings and any evidence, that is at variance with the pleadings turns on nothing.
26. A contract of employment is a reciprocal contract. An employee places his services at the disposal of another person or organization, as an employer, at a determined or determinable remuneration in such a way that the employer is clothed with authority over the employee and exercises supervision regarding the rendering of the employee services.
27. The Claimant's Pleadings are couched in a manner that suggests that there was no contract with a determined or determinable remuneration. For instance, the Claimant in paragraph 1(i) – (k stated:

“

- “(i) He will be entitled to a retainer salary of between Kshs. 80,000/= - 150,000/= plus a commission worth Kshs. 35,000,000/= on the 7th month.
- (j) He will be entitled to a retainer salary of between Ksh. 80,000/= - Ksh. 150,000/= plus a commission worth Ksh. 40,000,000/= on the 8th month
- (k) He will be entitled to a salary of between Kshs. 80,000/= - Kshs. 150,000/= plus a commission worth Kshs. 45,000,000/= on the 9th month”.

Further, the Court notes, that the Claimant employed the phrase, “salary up-to”. In my view, this is indicative that there was no contract of employment as alleged wherein a specific monthly remuneration was fixed. This will be part of the reason for the comment shortly hereinafter as regards the Claimant's case in general.

28. The Respondent contended, and the Claimant admitted in his evidence under cross examination, that the parties executed a Sale Trainee Agreement. The record reveals that the agreement was executed on 17th June 2022. I have carefully considered the terms of the agreement and hesitate not to conclude that it amounts not to a contract of employment and or does not contemplate an employment relationship where the Claimant could earn a monthly salary.
29. Clauses 2,3,4 and 5 of the agreement are all indicative of this. They provided:
 - “2. This Sale Trainee Agreement shall remain in force for a maximum period of five months from the commencement date. The initial three months will enable the Sales Trainee to gain adequate training and ensure to achieve a minimum production of 3 proposals for life insurance with a monthly premium of Ksh. 15,000/=. The Sales Trainee will be appraised by three months and a decision made either to terminate the agreement or continue with the agreement for the remaining period of two months.



3. During the period of this agreement, the company will pay on behalf of the Sales Trainee for the Executive Insurance Certificate of Proficiency (ECOP) training and qualification amounting to Kshs. 28,500/= which will be recoverable from the Sales Trainee in 12 equal monthly instalments from the date the Sales Trainee executes the Agency Contract. The funds will be treated as an advance and will be guaranteed by the Unit Manager, Branch Manager and Regional Manager. The ECOP training and qualification will facilitate the licensing of the Sales Trainee by the Insurance Regulatory Authority (IRA).
4. Upon IRA licensing, the sales Trainee will qualify to sign the Agency contract which is conditional on the Sales Trainee submitting to the company a minimum five (5) proposals for Life Assurance Covers with a total minimum monthly premium of Kshs. 25,000/=. At minimum, either three ordinary Life products or two (2) Madison Life Assurance Personal Pension Plan Proposals.
5. Should a Trainee fail to meet the minimum production within the term of this agreement, the agreement will terminate.”

30. In the upshot, I come to an inescapable conclusion that the relationship that existed between the Claimant and the Respondent was one where the Claimant was entitled to commissions anchored on Insurance Sales and not a monthly salary and commissions.

Is The Claimant Entitled To The Reliefs Sought?

31. Herein above, this court has found, first, that the Claimant was unable to prove the existence of a contract with a discernable determined or determinable salary, second, that there existed not a relationship between the Respondent and him whereby he was entitled to a monthly salary. Unquestionably, therefore, the question of unpaid salary cannot arise. The Claimant’s claim for compensation for the alleged unpaid salary is rejected.
32. In millions of shillings, the Claimant claimed payment of alleged unpaid commissions for sales made. With great respect to the Claimant, the figures sought were just thrown to Court. They are figures he did not lay a foundation for in his pleadings. He failed to prove the same through his evidence before this Court.
33. From the tone of his evidence under cross-examination and that of the Respondent’s witness, commissions could be paid based on sales made. Typically, and reasonably, this is what is expected. The Claimant admitted that he did not make a single sale. Put in another way, he did not bring a single business to the Respondent in terms of paid insurance proposals. Given this premise, I find considerable challenge to fathom what informed the Claimant’s claim for the millions he has sought.
34. In sum all that the Claimant did was try to play a lottery with the court process. Unfortunately for him, the alertness of this Court fueled by its experience with mischievous, vexatious and frivolous litigants cannot allow him triumph. His case is hereby dismissed with costs to the Respondent.
35. Orders accordingly.

READ, DELIVERED AND SIGNED THIS 29TH DAY OF DECEMBER, 2023.

OCHARO KEBIRA

JUDGE

In the Presence of;



Ms Achieng for the Respondent

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

