



**Obonyo v Britam Life Assurance Co (K) Ltd (Cause E035 of 2022)
[2022] KEELRC 13139 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13139 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E035 OF 2022
S RADIDO, J
NOVEMBER 9, 2022**

BETWEEN

BENARD NAMUTU OBONYO CLAIMANT

AND

BRITAM LIFE ASSURANCE CO (K) LTD RESPONDENT

RULING

1. Benard Namutu Obonyo (the claimant) and Britam Life Assurance Co (K) Ltd (the respondent) entered into a contract on or around 1 November 2017. The claimant was to serve as a Branch Manager, Narok.
2. At the same time, the parties entered into a subsidy agreement under which the respondent was to pay the claimant (additional) commission.
3. On 30 July 2018, the parties signed another contract under which the claimant was to serve as Branch Manager, Kisumu Branch. Another subsidy agreement was executed.
4. The relationship went south, and on 15 March 2022, the respondent issued a show-cause notice to the claimant asking him to respond to allegations of having committed a criminal offence to the detriment of the respondent.
5. The claimant responded on a date which is not clear, and a disciplinary hearing was held on 21 March 2022.
6. On 22 March 2022 the respondent issued to the claimant a notice of termination of the sales agent agreement.
7. The claimant sued on 23 August 2022, asserting unlawful termination of contract and breach of contract (unpaid insurance commissions).



8. Filed together with the statement of claim was a motion seeking orders:
 - (1)
 - (2)
 - (3) This honourable court be pleased to grant orders restraining the respondent from unlawfully increasing the applicant's loan interest rate from 6% per annum to 14.5% per annum pending the hearing and determination of this suit.
 - (4) The costs of this application be provided for.
9. The court gave directions on the motion on 23 August 2022, as a result of which the claimant filed his submissions on 25 August 2022.
10. Upon service, instead of filing a replying affidavit or grounds of opposition, the respondent filed a notice of preliminary objection contending that:
 - (1) This honourable court lacks jurisdiction to hear and determine this suit pursuant to the provisions of section 12 of the *Employment and Labour Relations Court Act*. Under the *Employment and Labour Relations Court Act*, this court's jurisdiction is restricted to hear matters relating to areas under listed therein and specifically those relating to occurrences out of an employment relationship.
 - (2) The suit is otherwise bad in law and brought in breach of procedure; hence it is incurably defective.
11. The court directed the parties on 19 September 2022 to file and exchange submissions on the preliminary objection and the motion.
12. The respondent filed its submissions on the preliminary objection on 3 October 2022 (should have been filed and served before 23 September 2022). The claimant had filed his submissions on 30 September 2022).
13. The court has considered the motion, affidavits, preliminary objection, and submissions and has come to the view that both the motion and preliminary objection should be declined because of the following reasons.
14. One, the facility letter executed between the claimant and the respondent expressly reserved to the respondent the discretion and right to revise the rate of interest upon giving a 30-day notice.
15. The claimant has not shown, on a *prima facie* threshold, that the decision of the respondent to revise the rate of interest violated the terms of the contract in place.
16. Two, despite seeking an interlocutory injunction, the claimant did not plead or seek an injunction in the memorandum of claim. There was no assertion of breach of contract with respect to the loan facility in the body of the memorandum of claim. The interlocutory injunction is this sought in vacuo (see *Kihara v Barclays Bank (K) Ltd* (2001) 2 EA 420).
17. Three, the establishment of an employment relationship when there is a legal objection is a question of mixed fact and law, and more often than not, it would be necessary for the parties to place before the court evidence beyond the employment contract upon which an inference of the relationship may be made.



18. In this respect, there has been a move from the common law control test to the four-fold test, the organisation test, and the permanency test. The parties should, therefore, reserve the determination of whether an employment relationship existed to a hearing on the merits.
19. In the case under consideration, it is worthy of note that the respondent appeared to exercise disciplinary control over the claimant by issuing him with a show-cause notice and taking him through a disciplinary hearing. The respondent now contends that there was no employer/employee relationship.
20. If, the claimant was not an employee, it is doubtful whether the respondent could have validly exercised disciplinary control over him by issuing the show-cause.

Conclusion and Orders

21. Flowing from the above, the court declines to grant the orders sought in the motion and/or uphold the preliminary objection.
22. The motion and preliminary objection are dismissed with costs in the cause.

DELIVERED VIRTUALLY FROM MALINDI, DATED, AND SIGNED ON THIS 9TH DAY OF NOVEMBER, 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Mr Odeny instructed by Bruce Odeny & Co. Advocates

For Respondent Mr Ataka instructed by AKO Advocates LLP

Court Assistant Chrispo Aura

