



**Njeru v Liberty Life Assurance Kenya Limited (Cause 589 of 2019)
[2022] KEELRC 13073 (KLR) (2 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13073 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 589 OF 2019
JK GAKERI, J
NOVEMBER 2, 2022**

BETWEEN

NGAI DICKMAXWELL NJERU CLAIMANT

AND

LIBERTY LIFE ASSURANCE KENYA LIMITED RESPONDENT

RULING

1. By notice of preliminary objection (herein after PO) dated November 19, 2019, the respondent asks this court to down its tools, that it has no jurisdiction to hear and determine the claimant's claim on the common and uncontested issues.
2. The preliminary objection is based on the grounds that:
 - i. That complaint and allegations contained in the statement of claim are based on an agency agreement signed between the claimant and the respondent in March 2018.
 - ii. The claimant was engaged as an independent contractor to be remunerated by way of commissions.
 - iii. There was an express term in the contract for the engagement that the said engagement was not a contract of employment.
 - iv. The contract of service clearly spelt out that the claimant was to receive commission on premiums received by the respondent. The contract provided a formula for administration and payment of the commissions.
 - v. The claimant is not entitled to the safeguards an employee is entitled to and he cannot seek remedies available to an employee.



- vi. The contract between the claimant and the respondent was a contract for services and not a contract of service and therefore a contract in the nature of a commercial contract.
3. The preliminary objection was filed together with the respondent's memorandum of response.
4. When the application came up for hearing on June 29, 2022, the respondent's counsel was absent. The court directed that the preliminary objection be canvassed of by way of written submissions.
5. The respondent/applicant had 14 days to file and serve its submissions and the claimant/respondent had 14 days after service and a mention was slated for July 27, 2022 on which date counsel for the claimant/respondent confirmed compliance. The respondent/applicant had not complied. A ruling date was given as November 2, 2022.

Claimant/Respondent's Submissions

6. The claimant submitted that the respondent's preliminary objection was mainly based on the nature of the claimant's contract of engagement with the respondent and urged that the contract of engagement between the parties was an agency agreement as opposed to an employment contract or contract of service as defined by the provisions of the *Employment Act*, 2007.
7. The claimant urged that a preliminary objection raises pure points of law not facts.
8. As to whether the respondent's preliminary objection has merit, the claimant submitted that his memorandum of claim filed on September 5, 2019 pleaded that the claimant was an employee of the respondent at a monthly salary of Kshs 82,000/= . That the claimant's pleadings make no reference to an agency agreement as alleged by the respondent/applicant.
9. It is the claimant's submission that the respondent's preliminary objection raises the issue in dispute.
10. The claimant urged that the preliminary objection herein had no merit as it did not raise a pure point of law and cannot be raised if any fact has to be ascertained was the case in the instant case where the nature of the claimant's employment was the issue in dispute.
11. Reliance is made on the decision of Ngenye, J in the matter of *Super Drill International Ltd v Sidian Bank Limited* [2021] eKLR where the learned judge restated the requisites of a preliminary objection as enunciated in previous decisions.
12. By 1st August when the court retired to prepare this ruling, the respondent/applicant had not filed its submissions in support of the preliminary objection.

Determination

13. Having considered the preliminary objection and the claimant/respondent's submissions on record, the only issue for determination is whether there is a competent preliminary objection before this court.
14. The nature of a preliminary objection has been explained in several decisions. The *locus classicus* enunciation was by the Court of Appeal in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 where Law JA and Newbold P stated as follows:

Law JA:

“So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a



preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

15. Newbold P on the other hand had the following to say,

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion . . .”

16. The Court of Appeal further restated the essence of a preliminary objection in *Nitin Properties Ltd v Singh Kalsi and another* [1995] eKLR as did the Supreme Court in *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others* [2014] eKLR.

17. A further restatement by the Supreme Court was made in *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR.

18. Needless to emphasize, a preliminary objection is a threshold issue which must be disposed at the earliest possible instance as it has the potential to dispose of the suit at an early stage.

19. In *Independent & Electoral Boundaries Commission v Jane Cheperenger & 2 others* (*supra*), the Supreme Court expressed itself as follows on the essence of preliminary objection.

“ . . . The true preliminary objection served two purposes of merit:

1. It served as a shield for the originator of the objection against profligate deployment of time and other resources, and
2. It served the public cause, of sparing scarce judicial time, so it could be committed only to deserving cases of dispute settlement. It was distinctly improper for a party to resort to the preliminary objection as a sword for winning a case otherwise destined to be resolved judicially, and on merits.”

20. In the present case, the preliminary objection is founded on the premise that the claimant and the respondent had an agency relationship, while pleadings filed by the claimant are explicit that claimant was employed by the respondent in March 2018 and was not issued with an appointment letter as by law required.

21. Admittedly, the issue whether the parties had a contract of service or contract for services is in dispute and core in this case.

22. In the words of Newbold P in *Mukisa Biscuits Manufacturing Co Limited v West End Distributors Limited* (*supra*), a preliminary objection “cannot be raised if any fact has to be ascertained . . .”

23. In the instant case, the nature of the claimant’s engagement is disputed and has to be ascertained by evidence.

24. For the foregoing reasons, the court is satisfied and holds that the preliminary objection before it is incompetent and is dismissed with costs.

25. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND DAY OF NOVEMBER 2022



DR. JACOB GAKERI

JUDGE

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 March 15, 2020 and subsequent directions of April 21, 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 Civil 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.

DR. JACOB GAKERI

JUDGE

