



**Owuor v Logitude International Ltd (Cause 111 of 2017)
[2022] KEELRC 13355 (KLR) (1 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13355 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 111 OF 2017
AK NZEI, J
DECEMBER 1, 2022**

BETWEEN

BRIAN J. OWUOR CLAIMANT

AND

LOGITUDE INTERNATIONAL LTD RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a Memorandum of Claim dated February 8, 2017 and filed in Court on February 10, 2017, and pleaded that he was employed by the Respondent on March 7, 2016 as a Sales Officer/Unit Head on a 3 months contract, earning Ksh 30,000 per month plus 4% on total sales, payable on the 15th day of every subsequent/following month.
2. The Claimant further pleaded that the contract was for a three months period from March 7, 2016 to June 7, 2016, but was renewed for six months to end on December 7, 2016 on the same terms.
3. It was the Claimant's further pleading that he was only paid part of his commission in April 2016 when he was paid Ksh 59,000, leaving a balance of Ksh 128,400 as at the time the contract expired on December 7, 2016; which was the Claimant's claim against the Respondent. The Claimant also prayed for costs of the suit and interest.
4. The Claimant filed his written witness statement dated February 8, 2017 and a list of documents evenly dated, listing six documents. The listed documents included a letter of appointment dated March 7, 2016, a renewal of contract dated June 7, 2016, NSSF provisional statement, demand letter dated January 11, 2017, payslips and computation of commission arrears.
5. The Respondent filed a Replying Memorandum and Counter-Claim on March 15, 2017 whereby it admitted having employed the Claimant at a salary of Ksh 30,000 plus 4% commission on total sales, payable on the 15th day of every subsequent month as per the Respondent company policy.



6. The Respondent further pleaded that it further communicated to the Claimant that in order for a loan to earn commission, the following three conditions had to be met.
 - a. the loan tenure ought to have been for three months or more.
 - b. the client must not be in arrears (it had to be a performing loan).
 - c. the client must not be a repeat client.
7. The Respondent further pleaded that the Claimant was duly paid his commission as per the Respondent company's policy, and that the amount claimed by the Claimant did not meet the criteria set out in paragraph 6 hereinabove.
8. It was the Respondent's further pleading that it would not have been prudent for the Claimant to claim commission on non-performing loans and that the claim for Ksh 128,400 was therefore denied. The Respondent further pleaded:-
 - a. that the Claimant also signed a confidentiality agreement by which he was bound but had failed to surrender to the Respondent a computer laptop, together with all the information in it, an internet router and a cellphone with client's contracts.
 - b. that although the Claimant owed the Respondent a fiduciary duty of loyalty, trustworthiness and good faith, he had violated the Respondent's code of conduct by contacting the Respondent's client by the name Elias Okach Ogola in 2016 and asked him to hand the claimant Ksh 4,700 which was due to the Respondent.
 - c. that the Claimant has always been pestering and harassing the Respondent's employees and using abusive language coupled with threats.
9. The Respondent sought the following reliefs against the Claimant:-
 - a. Ksh 58,000 being the amount claimed from the Claimant by the Respondent.
 - b. an order compelling the Claimant to hand over the Respondent's assets in his possession together with the information therein contained.
 - c. a prohibiting/restraining order restraining or prohibiting the Claimant from divulging any confidential information contained in the company assets in the Claimant's possession.
 - d. an order prohibiting/restraining the Claimant from contacting the Respondent's clients.
10. The Respondent further filed a list of documents listing eight documents, which accompanied the replying memorandum and counter-claim.
11. On April 16, 2018, the Claimant filed Reply to the Respondent's Response and Counter-Claim, and denied the Respondent's counter-claim.
12. The Respondent did not file any witness statement and/or witness affidavit, and its application to file a witness statement after hearing the Claimant's evidence and cross-examining him was dismissed by this Court vide a Ruling dated June 30, 2022.
13. The Claimant testified on December 16, 2021. He adopted his filed witness statement as his testimony in chief and produced in evidence the documents referred to in paragraph 4 of this judgment. The Claimant further testified:-
 - a. that the commission payable to him was supposed to be paid without any conditions.



- b. that the Claimant was never issued with non-payment of commission policy, and that he never signed any such policy.
- c. that on the Respondent's counter-claim, the laptop and modem issued to the Claimant by the Respondent were stolen from the Claimant's premises, and that the matter was reported to the police, and OB No 10/12/2016 was issued.
14. Cross-examined, the Claimant testified:-
- a. that the Claimant's duty was to take clients to the Respondent to get loans, and that once a client qualified and a contract was signed, the Claimant was supposed to get 4% of the principal amount.
- b. that commission was payable to the Claimant whether or not the loan was performing.
15. Having not filed any witness statement, the Respondent closed its case without calling any evidence; and both parties filed written submissions, which I have considered.
16. The single issue for determination in this case is whether the Claimant is entitled to be paid the claimed sum of Ksh 128,400.
17. The fact of the Claimant having been employed by the Respondent is not disputed. It is also not disputed that the Claimant was entitled to be paid 4% of total sales, payable on the 15th day of every subsequent month as pleaded by the Claimant. According to the Claimant's contract of service dated March 7, 2016, which the Claimant produced in evidence, payment of 4% commission was not pegged on any conditions. The contract of service provided, in part:-
- “as indicated above, you will be on a three months' contract from 7th March 2016 to 7th June 2016, with a consolidated base salary of Ksh 30,000 per month. Your commission will be 4% of total sales paid to you on the 15th day of the following month. Please note that renewal/extension of this short term contract will depend on the performance and growth of business in Mombasa.”
18. The Claimant produced in evidence a renewal of contract letter dated June 7, 2016 renewing his contract on the same terms for six months ending on December 7, 2016. The renewal letter was issued by the Respondent, and the Claimant signed on it in acceptance on June 30, 2016.
19. The computation of commission arrears payable to the Claimant by the Respondent at the end of the renewed contractual term was not disputed by the Respondent, and no evidence was adduced to controvert or in rebuttal of the same.
20. The evidence given by the Claimant stands unchallenged, as the Respondent did not call any evidence in proof of its pleadings and/or prosecution of its counter-claim.
21. The Court in the case of *North End Trading Company Limited (carrying on business under the Registered name) Kenya Refuse Handlers Limited -v City Council of Nairobi* [2019] eKLR stated:-
- “in Edward Muriga Through Stanley Muriga vNathaniel D Schuler Civil Appeal No 23 of 1997, it was held that where a defendant does not adduce evidence, the plaintiff's evidence is to be believed, as allegation by the defence is not evidence.
19. in the case of *Motex Knitwear Limited vGopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No 834 of 20002, Lesit, J* citing the case of *Autar*



Singh Bahra And Another vRaju Govindji, Hccc No 548 Of 1998 appreciated that:

“although the defendant has denied liability in an amended defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff’s case stand unchallenged, but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail.”

22. It was held in the case of *Cmc Aviation Ltd vCrusair Ltd* [No 1] (1987) KLR 103 as follows:-

“the pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

23. In the present case, the Respondent did not call any evidence in prove of the averments made in its defence and counter-claim. The Counter-Claim must fail, and is hereby dismissed.

24. The Claimant has proved his claim on a balance of probability. I therefore enter judgment for the Claimant against the Respondent for the claimed sum of Ksh 128,400 being unpaid commission as per the contract between the Claimant and the Respondent.

25. The Claimant is awarded costs of the suit and of the counter-claim. The Claimant is also awarded interest at Court rates, to be calculated from the date of this Judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1ST DAY OF

DECEMBER 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Miss Kyalo for Claimant

Miss Nganga Respondent

