REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 453 OF 2017

MOSES WAITHAKA NGUNJE.....CLAIMANT

VERSUS

LIBERTY LIFE ASSURANCE KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein was employed by the Respondent as a team leader at the Respondent's Nanyuki Branch where he was earning a net salary of Kshs. 160,000/- per month. The Claimant averred that he was to recruit and motivate agents for the Respondent. He averred that through economic duress coerced him to sign another contract of engagement reducing the monthly salary from Kshs. 160,000/- to Kshs. 100,000/- by withholding the July, August and September 2015 salaries and urging him to sign the new contract to facilitate payment of his wages. It was averred that despite his signing the new contract the Respondent neglected to pay his dues. The Claimant averred that he was dismissed and that he was not issued with any notice to show cause prior to the dismissal. He thus sought the remainder of the contract from August 2015 to December 2015, 3 months pay in lieu of notice, costs of the suit and interest.

2. The Respondent in its defence averred that it was a stranger to the averments in the memorandum of claim. It averred that the Claimant was engaged as an insurance agent stationed at Nanyuki and that it never refused to remunerate the Claimant as per the terms of the contract. It was averred that the contract with the Claimant was terminated in accordance with the provisions of the contract and there was no impropriety in the dismissal. The Respondent averred that the Claimant not being an employee, he was improperly before this court. The Respondent urged the dismissal of the claim with costs.

3. The Claimant and the Respondent's witness Jackson Mbuthia Kiboi testified. The Claimant testified that he was employed by the Respondent from 1st July 2015 after training by the Respondent. He stated that he reported to Nanyuki branch pursuant to the agency contract he had with the Respondent and in October 2015 was issued with another contract which was for 1 year. He testified that the salary was Kshs. 100,000/-fixed and that he received it only once. He stated that after not receiving any salary he sought legal advice and issued a demand letter to which the Respondent responded by giving him a dismissal letter dated 19th November 2015. He stated that he was a team leader and therefore was not a commission agent. He testified that he was to receive a month's notice before termination of the contract and he did not receive any prior to the termination. In cross-examination he testified that the agreement signed on 2nd October 2015 set out his role and duties as manager and team leader. He stated that he was poached from UAP Life in Nyeri and was taken to Nairobi for training and induction. He testified that he joined as an agent and given a month to prove his capability in June 2015. He stated that an agents or insurance licence is renewed annually and that he had it and the Respondent only facilitated the renewal. He confirmed he joined the Respondent as an agent. He was referred to the provisions of clause 2.2 of the agency agreement and stated that the agreement did not constitute employment. He stated that the contract was terminated once the new contract was entered into. He testified that the appointment as team leader automatically negated the previous contract and he was responsible for certain roles. He stated that he was not before court on account of the previous contract but because of the subsequent contract for which no commissions were earned. He stated that he received 113,000/- after tax and also some 90,000/-. He stated he was entitled to Kshs. 115,230 inclusive of commission and that 10% was withheld as statutory deduction for agency. He testified that as team leader he had a salary of Kshs. 90,000/- and that NSSF and NHIF dues were not deducted. He stated the second contract was a contract of engagement between him and the Respondent. He conceded that the hours of work and the place of work were not stated and did not provide for retirement age. He stated that he was not terminated as an agent and that he was terminated as a team leader. In re-examination he testified that the termination was not for failure to meet performance standards but for failure to perform duties for 7 consecutive days. He stated that the second contract had not provided for reasons for termination. He stated that one cannot be under 2 contracts.

4. The Respondent's witness testified that the Claimant was engaged as an insurance agent hence the contract. He stated that the Claimant did not have a licence from Insurance Regulatory Authority as at the time he joined the Respondent and as per industry practice he received a provisional agents licence from Association of Kenya Insurers (AKI) and the licence was valid for 12 months from 14th July 2015 to 13th July 2016. He testified that the Claimant was not engaged as an employee but as an agent and was to be compensated through commission not a salary. He stated that the Claimant had a contract which gave particulars on minimum performance standards. He testified that the Claimant received advance payment to enable him build capacity to recruit agents to bring insurance proposals and at the point of determining the commission payable to him the advance payment was deducted and as per the commission slips for September exhibited in evidence he received net pay on commissions of Kshs. 13,708/-. He was cross-examined and stated that the contract was an agency agreement and provided circumstances for termination under clause 8. He testified that the Claimant was terminated in accordance with the provisions of the contract's clause 8.1 for non-performance. In re-examination he stated that the Claimant did not report to an office and as an insurance agent was stationed in Nanyuki and because he was absent he was dismissed.

5. As at the time of penning the judgment, the Claimant's submissions were not on the file. The Respondent filed submissions in which the Respondent submitted that the Claimant was wrongfully before the Court as he was not an employee of the Respondent and the reliefs he seeks cannot be obtained from this court. The Respondent submitted that under Section 2 of the Employment Act, an employee was defined as a person employed for wages or a salary and includes an apprentice and indentured learner. The Respondent cited the case of **Vitalis**

Oliewo K'omudho *v* AAR Health Services [2016] eKLR where it was held that the court has to look into the intentions of parties and look at the relationship of the parties. The Respondent submitted that as garnered from the clauses in the contract the Claimant was an agent and not employee. It was submitted that he received commissions and not a salary. Reliance was placed on the case of **Simon Njuguna Kago *v* Pan African Life Assurance Limited [2018] eKLR** where the court found the claimant therein was an insurance agent/independent contractor and not an employee of the respondent. The Respondent submitted that the Claimant failed to prove that he earned a salary at all or was entitled to leave and the like. The Respondent cited the case of **Evans Musya Musunzar *v* Jubilee Insurance Company of Kenya Limited [2018] eKLR** and the case of **John Kawa Ilume *v* Gemina Insurance Co. Ltd [2014] eKLR** on agency and the commercial nature of disputes between agents and the principal. The Respondent urged the court to dismiss the claim as it had no jurisdiction.

6. The Claimant's claim was misplaced. He had a contract of engagement with the Respondent and not a contract of employment. He was to receive a subsidy as remuneration and not a salary. The subsidy had a formula for administration. He had an agent agreement which clearly spelt out his roles as an agent and his obligations and the mode of termination of the agency agreement. He was not an employee of the Respondent and was therefore not entitled to the safeguards an employee is entitled to nor could he seek the remedies employee seeks. The Claimant repeatedly stated in his evidence that he was an agent. Relying on the cases of **Simon Njuguna Kago *v* Pan African Life Assurance Limited**, **Evans Musya Musunzar *v* Jubilee Insurance Company of Kenya Limited** and the case of **John Kawa Ilume *v* Gemina Insurance Co. Ltd** (*supra*) a factor is not an employee and even if there was a contract, such a contract is not a contract of service but a contract for service and in the nature of a commercial contract creating an agency relationship for which redress is not here. As there was no employer employee relationship the suit herein is incompetent and an abuse of the court process. What perhaps the Claimant had was a right to seek relief in commercial division of the High Court for payment of commissions or for breach of a commercial contract. Suit is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 24th day of September 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar