



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 844 OF 2017

EVANS MUSYA MUSUNZAR..... CLAIMANT

Versus

JUBILEE INSURANCE COMPANY OF KENYA LIMITED..... RESPONDENT

RULING

1. This ruling proceeds from the Respondent's application brought by Notice of Motion dated 15th June 2017 seeking the following orders:

- a. That all further proceedings herein be stayed and the matter be referred to arbitration;
- b. That the costs of the Application be provided for.

2. The application, which is supported by an affidavit sworn by the Respondent's Group Company Secretary and Head of Legal Services, Margaret Kipchumba is based on the following grounds:

- a. The jurisdiction of this Court is as conferred by Article 162(2) of the Constitution as read together with Section 12 of the Employment and Labour Relations Court Act;
- b. The said jurisdiction relates to hearing and determination of disputes relating to or arising out of employment between an employer and an employee;
- c. The agreement entered into between the Claimant and the Respondent is not a contract of service and thus the relationship between the Claimant and the Respondent was not that of an employer-employee but one of a principal and agent;
- d. Accordingly, this Court lacks jurisdiction to entertain and determine the dispute herein as it does not relate to an employment relationship but is a dispute arising out of an agency agreement;
- e. Without prejudice to the foregoing, this Court lacks the jurisdiction to entertain and determine this dispute, the parties having agreed to resolve all disputes by way of arbitration in accordance with Clause 4(j) of the agreement between the parties;
- f. The aforesaid arbitration agreement is operative and capable of being performed and the Respondent is ready and willing to have the dispute herein determined by way of arbitration;
- g. The parties herein are contractually bound to refer any disputes between them to arbitration in accordance with the agreement, while this Court is enjoined to hold parties to their bargain;

h. The Claimant alleges to have been wrongfully and unfairly terminated and seeks orders against the Respondent for dues which the Respondent disputes. The dispute is therefore capable of being referred to arbitration;

i. It is just and equitable to grant the relief sought. In his replying affidavit sworn on 14th July 2017, the Claimant states that the Respondent's application to have the matter referred to arbitration is statute barred by dint of Section 6(1) of the Arbitration Act.

3. Regarding the Respondent's averment that there was no employment relationship between the parties, the Claimant states that he was employed by a letter of appointment dated 7th July 2014 and a contract of service dated 8th July 2014. Pursuant to the contract, the Claimant was appointed in the Respondent's management team as an Assistant Sales Manager in the Life Insurance Department. He was in charge of an area referred to as Central Region 2.

4. The Claimant adds that upon his appointment to the management team, he was required to supervise junior employees of the Respondent working in the Central 2 Region, comprising of Sales Agents, Unit Managers and Agency Managers. His responsibilities were generally aimed at promoting and developing the Respondent's Life Insurance Business in the Region.

5. The Claimant further states that while working as Assistant Sales Manager, he occupied an office within the Respondent's offices located in Westlands, Nairobi, from where he operated. Pursuant to the agreement, he was paid a monthly salary comprising of a retainer and a commission.

6. It is the Claimant's case that his relationship with the Respondent was governed by the Employment Act, 2007 as well as the rules of fair labour practices guaranteed under Article 41 of the Constitution.

7. The twin issues for determination in this application are as follows:

a. Whether there was an employment relationship between the Claimant and the Respondent capable of enforcement by this Court;

b. Whether the arbitration clause in the agreement between the parties ousts the jurisdiction of this Court.

8. The jurisdiction of this Court, which is specialised in nature is set out under Section 12 of the Employment and Labour Relations Court Act. As far as employment matters are concerned, the jurisdiction of the Court is confined to the existence of an employment relationship between the parties. The question to ask then is whether the Claimant was an employee of the Respondent as defined in law.

9. Section 2 of the Employment Act, 2007 defines an employee as:

“a person employed for wages or a salary and includes an apprentice and indentured learner”

10. The same section defines an employer as:

“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual”

11. A contract of service is defined as:

“an agreement, whether oral or in writing, and whether expressed or implied, to employ or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership”

12. The contract between the Claimant and the Respondent states inter alia:

“The Assistant Sales Manager is a Life Insurance Agent of the Insurer operating under Life Assistant Sales registered as No.

The Insurer is desirous of appointing the Agent as an Assistant Sales Manager to supervise a team of Agency Managers, Unit Managers and Life Agents operating in the same region.

The INSURER HEREBY agrees with the Assistant Sales Manager that the Insurer will during the continuance of this agreement, make payments to the Assistant Sales Manager of an over-riding commissions of 3% on such amount of the first year commission earned by the Life Agents allocated to him by the Insurer. “

13. In *John Kamau Mburu v Program for Appropriate Technology in Health & another [2015] eKLR* this Court held that the mere fact that parties work together does not necessarily give rise to an employment relationship. In *Ontario Ltd v Sagaz Industries Inc. 2001 SCC 59* the Supreme Court of Canada held that in determining whether an employment relationship actually exists, the Court must examine the total relationship between the parties.

14. Further, as held by **Kimondo J** in *Everret Aviation Limited v the Kenya Revenue Authority [2013]eKLR* the traditional common law tests of control and integration are no longer conclusive for the determination of the existence of an employment relationship. The Court must examine the intention of the parties, not only as expressed in the documents of engagement but also as evidenced in the fundamental behaviour of the parties.

15. From the evidence on record, the Claimant was not paid a standard monthly salary and the contract of engagement clearly referred to him as an Agent. In the circumstances, the Court found no trace of an employment relationship as defined in law and the straightforward result is that this Court lacks jurisdiction to entertain the Claimant’s claim, which is commercial in nature.

16. Having found that I have no jurisdiction to entertain the claim, I will not venture to make a determination on the issue of arbitration. Instead, I will take guidance from the decision of the Court of Appeal in *Professor Daniel N. Mugendi v Kenyatta University & 3 others (Civil Appeal No 6 of 2012)* and refer the matter to the Commercial Division of the High Court for disposal.

17. Each party will bear their own costs in the application.

18. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF JANUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Miss Fundi for the Claimant

Mr. Mbaluto for the Respondent