



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1173 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 26th September, 2018)

SIMON NJUGUNA KAGO.....CLAIMANT

VERSUS

PAN AFRICA LIFE ASSURANCE LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit on 15th July 2015 through the firm of Anya Kalwa & Co. Advocates seeking damages for wrongful and unlawful termination.
2. He avers that he was employed by the Respondent on 14th July 1999 as a life insurance agent on the understanding that the schedule of his duties would be given to him upon completing training and his gross consolidated salary and/or commission would be Kshs.115,761.00/- and that during the employment he would be entitled to out-patient care under third party fund arrangement with Pan Africa Life Insurance.
3. He states that he has never done anything contrary to his employment contract and in the circumstances the Respondent's actions are malicious, un-contractual, spiteful, unconscionable, unfair, wrongful, illegal and in breach of mandatory statutory provisions.
4. He further avers that he has never breached any obligations of his employment contract and his job performance has always been satisfactory and exemplary. He avers that the actions by the Respondent is callous, arbitrary, unlawful and illegal under the provisions of the Employment Act No. 11 of 2007 ("the Act") on mode of termination and redundancy.
5. He further claims for a declaration that the Respondent's actions, omission and/or attempts to declare him redundant and/or terminate the Claimant is wrongful and uncontractual. He also claims for orders for reinstatement and payment of all accrued but unpaid salary and/or commission for the period he kept off work.
6. He further states that despite demand and notice of intention to sue, the Respondent has failed, refused and/or neglected to make good his claim.
7. The Respondent filed their defence where they admit that the Claimant was their employee but deny that there was any contract entered into between them and the Claimant on 14th July 1999. This is because as of 14th July 1999 no rights and obligations were set out for both parties but instead the contracts signed between both parties have been contracts for service not contracts of service. None of them created an employment relationship and that for the entirety of the relationship between itself and the Claimant, Income tax deducted from the commission due to him has been Withholding Tax, not Pay-As-You-Earn Tax.
8. They also aver that the Claimant's suit manifests a gross abuse of the process of Court and to that extent ought to be dismissed with costs. They further add that this Honourable Court lacks jurisdiction to grant any of the prayers sought in the Memorandum of Claim and that the suit ought to be dismissed with costs in limine.
9. In conclusion, they aver that the provisions of the Employment Act 2007 were not applicable to the relationship that existed between the Claimant and itself and denied having breached any of its obligations under any of the contracts it entered into with the Claimant.

Submissions

10. The Claimant filed his submissions where he submits that the Respondent's attempts to declare him redundant and/or terminate him is

callous, unlawful, arbitrary, illegal, un-procedural and wrongful under the provisions of the Employment Act 2007 as they failed to communicate the reasons for seeking to declare redundant as well as failed to follow the laid down procedure for retrenchment, declaration of redundancy and/or termination.

11. He avers that their actions are in the circumstances irregular, unlawful and illegal and without due regard to mandatory legal provisions governing redundancy hence prays that this Honourable Court awards in his favour against the Respondents.

12. The Respondent filed their submissions where they submit that the nature of the contract existing between the Claimant and the Respondent was a contract for service and not contract of service meaning that the Respondent organization considers Insurance agents to be independent contractors not employees. This, is the traditional structure of the trade, a fact that militates against any suggestion that the Claimant was an employee of the Respondent. Hence it is clear to say that no contract existed between the Claimant and the Respondent and that he was an independent contractor. They relied on the case of **Industrial Court of Kenya at Mombasa, Cause No. 363 of 2013: Elijah Moranga Vs Irene Onderi.**

13. They aver that given that there was no contract of service between the Claimant and the Respondent, they submit that the Court has no jurisdiction to grant any of the prayers sought in the Claimant's claim and therefore the claim for unlawful termination of the employment has to fail. They urge the Honourable Court to dismiss the claim with costs, as the Respondent, in fairness, has incurred costs in defending the suit.

14. I have considered all the evidence and submissions filed by both parties herein. The issues for determination are as follows:-

1. Whether the Respondent and Claimant had an employment relationship.

2. If so, whether there were any valid reasons to warrant dismissal of the Claimant by the Respondent.

3. Whether due process was followed before the dismissal of the Claimant.

15. On the first issue, the only determinant document that can prove the type of relationship that existed between Claimant and Respondent is the Claimant's Appointment letter (Exhibit 1). The letter states as follows:-

"RE: APPOINTMENT

I am glad to inform you that you have been appointed as an agent of Pan Africa Insurance Company Limited according to the agency contract you signed on 14th July 1999 (Copy attached).

You have been entered in the roll of agents under code S029. Ensure to quote the code on all proposals and correspondence for prompt action.

As agreed with your Manager, your monthly production target for the balance of the year will be Kshs.1000/=-, which will be reviewed regularly with your Manager. Continuation of this contract is subject to your continued achievement of the agreed target and all the terms and conditions in your contract.

A copy of the ratebook is attached for your use and safe custody.

Welcome to the organization with a sense for life.

Yours faithfully

Signed

WAHOME NGARI

MARKETING MANAGER – LIFE “

16. The contract itself signed between the Claimant and Respondent is a "Life Assurance Agent's contract". The contents show that indeed the Respondent entered into an agency relationship.

17. Appendix 2 (Respondents document) is the second contract dated 18/2/2005. Under paragraph 6 of the contract:-

"The company agrees to pay to the Agent and the Agent agrees to accept as full and complete payment for his services under the contract the commissions on his sales in accordance with the Company's scales of commission described in the Schedule hereto...."

18. The relationship between the Claimant and Respondent from this contract shows that the relationship was an Agency relationship.

19. The last contract between Claimant and Respondent is dated 1.1.2013. At paragraph 2 of the contract, it is stated as follows:-

“...it is hereby agreed and understood for the avoidance of doubt that the Life Assurance Agent is and shall at all times be and act as an Independent Contract and nothing contained herein or otherwise shall be construed as creating an employer/employee relationship between the Parties. The Life Assurance Agent shall not be entitled to any employee benefits including termination benefits under any labour or other laws in Kenya”.

20. Paragraph 11 of the said contract further states as follows:-

“Independent Contractor

Nothing in this contract shall constitute a joint venture or partnership between the parties hereto. For the avoidance of all doubt, both parties herein confirm that the Life Assurance Agent enters this contract as an independent contractor and that he is not or shall not for any purpose be considered an employee of the company (emphasis is mine).

As an independent contractor, the Life Assurance Agent shall bear exclusive responsibility for the payment of all statutory payments as a self-employed person, for the filing of annual returns of the Kenya Revenue Authority (KRA) as a self-employed person, and for the discharge of any income tax, VAT and/or withholding tax arising out of payment for the services performed under this contract. As an independent contractor, the Life Assurance Agent, shall not be entitled to any compensation, gratuity or indemnity upon the expiry or termination of this contract howsoever terminated”.

21. It is very clear from the above analogy that the relationship between the Claimant and Respondent was purely an Agency relationship and not an employment relationship. The relationship envisaged is that called an independent agent or an insurance agent. This is what is normally referred to as a non-servant agent.

22. Blacks Law dictionary 9th Edition at page 888 defines an independent contract as:-

“Someone who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it. It does not matter whether the work is done for pay or gratuitously. Unlike an employee, an independent contractor who commits a wrong while carrying out the work usually does not create liability for the one who did the hiring”.

23. It is my finding that the Claimant having been an insurance agent/independent contract, he was not an employee of the Respondent.

24. In the circumstances, this Court lacks jurisdiction to handle this case as envisaged under Section 12 of Employment and Labour Relations Court Act which restricts this Court’s jurisdiction to the areas mentioned and specifically as they relate to an occurrence arising out of an employment relationship.

25. It is my finding therefore that since this Court lacks jurisdiction to handle this matter, I will not delve into the other issues for determination. I dismiss this claim accordingly. I will not order any costs in the circumstances.

Dated and delivered in open Court this 26th day of September, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Serunjoji holding brief for Kalwa for Claimant – Present

Odaga holding brief for Leshan for Respondent – Present