



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LABOUR RELATIONS COURT AT NAIROBI

E.L.R.C. NO. 2054 OF 2017

JULIUS KIBERA GITURO.....CLAIMANT

VERSUS

ICEA LION INSURANCE COMPANY LTD.....RESPONDENT

RULING

Introduction

1. The Application before the Court is the Notice of Motion dated **22nd February, 2018** and is brought by the Claimant seeking the following orders:

- a) Respondents does produce before Court for inspection the Claimant's employment contract dated 1st May 2009 and/or any other Tied Life Agency contract executed by the parties (sic) hereto.
- b) Respondents does produce before Court for inspection the Claimant's commission statement relating to the period between February 2017 to the date of filing the statement.
- c) Any other direction as it deems fit for just and expedient disposal of this cause.
- d) Cost of this Application be provided for.

2. The Application is brought under Section 10(7) of the Employment Act, Section 1A, 1B, 3A and 63 of the Civil Procedure Act CAP 21 Laws of Kenya and all the enabling provisions of the Law. It supported by the claimant's affidavit sworn on 22.2.2018 and the following grounds set out in the body of the motion:

- a) That the Claimant is a former employee of the Respondent.
- b) That the terms of employment contract was that the Claimant would sell policies to third parties and then get remunerated on commission basis.
- c) That the commissions were to be calculated at the end of every month by the Respondent and then compute the commission payable to the Claimant.
- d) That the date the Claimant resigned, the Respondent neglected and/or refused to provide the Claimant with commission statement hence necessitating this suit.
- e) That for fair and just determination of the dispute the Court needs to examine the commission statements that are in sole custody of the Respondent.
- f) That it is in the interest of justice that this Application be allowed.

3. The application is opposed by the respondent through the Replying Affidavit sworn by the Mr. Patrick Kihara on 30.4.2018. The gist of the objection is that the claimant was never employed by the respondent under a contract of service but engaged as a Tied Life Agent for a commission under a Tied Life Agent Agreement. That the said agreement went missing and/or was misplaced from the respondent's records. In addition, the respondent produced copy of commission statement for the claimant but averred that she is under no obligation to pay the commission to him because he breached the terms of the agreement, particularly clause 3.6, which deals with fiduciary trust.

4. The application was disposed of by written submissions, which I have carefully considered alongside the motion, affidavits and the pleadings filed.

Analysis and determination

5. The issues for determination arising from the said material presented to the court are:

- a) Whether the court has jurisdiction to entertain this suit.
- b) Whether the orders sought should be granted.

Jurisdiction

6. The jurisdiction of this court has become clear since the promulgation of the 2010 constitution. By dint of Article 162(2) (a) of the said constitution and section 12 of the Employment and Labour Relations Court Act, the court's jurisdiction is limited to determining employment and labour relations disputes only. Paragraph 3 of the Statement of Claim filed herein states as follows:

“3. The claimant worked for the respondent as a Tied Life Agent (TLA) effective 1st May 2009 with remuneration being on commission basis. The commission was paid monthly from premiums paid to the Respondent's Account by the customers under the claimant's fort folio as follows;

I. 40% of the new Customers premium for the 1st year.

II. 20% during the 2nd year.

III. 5% for the remaining life of the policy”

7. Upon careful consideration of the foregoing pleading, and the contention by the respondent that the claimant was never her employee, I am inclined to return that the dispute herein does not fall within the jurisdiction of this court as donated by Article 162(2)

(a) of the said constitution and section 12 of the Employment and Labour Relations Court Act. I must therefore which I now do, down my tools because jurisdiction is everything to a court.

8. The reason for the foregoing drastic action is because the parties herein related under a contract for services in which the claimant was hired as an independent contractor earning a commission as opposed to an employee under a contract of service. Section 2 of the Employment Act defines an employee as

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

9. In view of the finding that the court lacks jurisdiction to determine the dispute herein, I will not determine the application on merits and instead let other courts, which are clothed with the necessary jurisdiction to do that.

Conclusion and determination

10. I have held that this court lacks jurisdiction to determine the dispute herein and as such, downing tools, I must. However, since I was not asked to strike out the suit, I transfer the suit to the Chief Magistrates Milimani Commercial Court, for hearing and determination. Costs in the cause.

Dated, Signed and Delivered in Open Court at Nairobi this 30th day of November, 2018

ONESMUS N. MAKAU

JUDGE