



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 446 OF 2013

JOHN KAWA ILUMECLAIMANT

VERSUS

GEMINA INSURANCE CO. LTDRESPONDENT

RULING

The claimant filed this suit on 19/12/2013 claiming terminal dues and compensation for unfair and unlawful termination of his employment by the respondent. At first the respondent filed a defence admitting employment relationship between herself and the claimant but later amended the same to deny such relationship. Instead she contended that the claimant was only a Commission Agent contracted in her insurance business. According to the defence, the claimant misappropriated the premium received on her behalf amounting to ksh.88200/ prompting her to terminate the agency contract. She counter claimed for the ksh.88200/.

When the suit came for hearing on 29/5/2014 no Preliminary Objection (P.O.) was raised regarding the jurisdiction of this court until after the claimant's case was closed. The court allowed arguments on the P.O. because it is within the law of procedure for a P.O. to be raised at any stage of the proceedings. Mr. Mogeni learned counsel for the respondent submitted that, the evidence adduced by the claimant showed that the claimant was engaged as an independent contractor for a retainer and commission. According to the learned counsel, Section 2 of the Employment Act defines an employee as a person employed for wages or salary. He further submitted that Section 49 of the Act is not applicable to this case because damages under it are only pegged on salary and not commission.

He also contended that the retainer paid to the claimant was not automatic but conditional to help him achieve the purpose of earning the commission. He further contended that the evidence adduced shows that the claimant was a registered insurance agent. As a consequence of the above reasons Mr. Omogeni submitted that the court lacks jurisdiction and urged the court to refer the suit to another forum.

Mr. Shimaka learned counsel for the claimant maintained that the employment relationship between the parties had initially been admitted by the defence. He submitted that the claimant was an employee on the basis that he was earning a retainer. Mr. Shimaka cited a book Labour Law, 2nd Edition written by Simon Deakin and Gillian J. Moris to show that an Agent is also an employee especially where one is receiving instructions and orders from the principal on daily work. In addition, he submitted that the clause in the contract restricting the claimant to work for the respondent alone rendered the Agency an employment. Mr. Shimaka was, never the less willing to abide by the courts direction on the P.O.

In response Mr. Omogeni maintained that the only criterion to consider is whether there was

payment of salary or wages.

After perusing the pleadings and considering the evidence adduced and the submissions made by the two counsel, there issues for determination are:

1. **whether the parties herein were in an employment relationship or not.**
2. **Whether the court has jurisdiction over the suit herein.**

To answer the first issue, the court considered Section 2 of the Employment Act which defines an employee as a person employed for wages or salary. In the present case the claimant was being paid in the form of a retainer and commission. It is common knowledge that a retainer is a fee to keep an independent contractor of services engaged so as to provided the contracted service as and when required. It also means an advance lupsom pay for example to a lawyer when he is instructed to act for a client.

From the above context, the fact that the claimant was paid a retainer every month did not make it a salary or wage. Consequently the court agrees with the defence that there was no employment relationship between the parties herein as contemplated by Section 2 of the Employment Act. Flowing from the foregoing finding, it is obvious that this court lacks jurisdiction to determine this suit. Article 162(1) of the constitution establishes this court to deal with employment and labour relations disputes only and not disputes related to Agency contracts for services between principals and independent contractors. The Industrial Court Act which donates jurisdiction to this court does not seem to extend it to cover disputes of retainer of independent contractors.

Consequently, the suit is to be forwarded to another forum which has the jurisdiction to entertain the dispute for hearing and final determination. The parties have not suggested in their submissions which forum is best suited to receive this file. Consequently the matter shall be stood over generally until the parties suggest the forum before which the suit will be tried.

Orders accordingly

Dated, Signed and delivered this 11th July 2014

O.N. Makau

Judge