



Kenfirm Insurance Agency Ltd v Commissioner of Insurance (Insurance Appeal E017 of 2021) [2024] KEHC 9133 (KLR) (Commercial and Tax) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSURANCE APPEAL E017 OF 2021**

FG MUGAMBI, J

JULY 26, 2024

BETWEEN

KENFIRM INSURANCE AGENCY LTD APPELLANT

AND

COMMISSIONER OF INSURANCE RESPONDENT

(Being an appeal from the decision of the Insurance Appeals Tribunal dated and delivered on 12th October, 2020 at Nairobi)

JUDGMENT

Background

1. The dispute between the parties herein has its genesis in a staff medical scheme insurance business, in respect of Royal Media Services (RMS). The appellant's case is that it procured business with RMS in 2005 and placed the business with Resolution Insurance Company Limited as an underwriter. The business relationship continued and over the years the appellant was duly paid its commissions by the underwriter for the business whenever the same was renewed.
2. This was before the underwriter allegedly began to sideline the appellant and started dealing with RMS as a direct business account. The appellant referred the dispute to the Commissioner of Insurance who held that the appellant did not participate in a procurement process for the 2019 medical insurance renewal of the RMS business and was therefore not entitled to commissions for 2019 and 2020.
3. The decision of the Commissioner was upheld by the Insurance Appeals Tribunal (the Tribunal). Being dissatisfied with the decision of the Tribunal the appellant filed a Memorandum of Appeal dated 5/3/2021 seeking to set aside that decision dated 12/10/2020.



Analysis and Determination

4. I have carefully considered the pleadings, submissions and evidence presented before the court. Appeals to this court from the Tribunal are limited to grounds of law by dint of section 173(3) of the *Insurance Act* (the Act). It provides that:

“A person aggrieved by a decision of the Tribunal made under subsection (1) may, if it involves a question of law, within one month from the date on which the decision is intimated to him, appeal therefrom to the court.”
5. Two issues arise for determination:
 - i. Whether the Tribunal erred in finding that there existed no agency relationship between the appellant and the underwriter.
 - ii. Whether the appellant is entitled to the reliefs sought in the appeal.
6. On the first issue, the appellant argues that since the RMS business was initially sourced in 2006, it was renewed severally and each time the appellant consistently received commissions until 2015. The appellant further asserts that there is no evidence to suggest that the agency relationship was formally terminated. As such the unpaid commission ought to have been paid.
7. The appellant disputes the Tribunal's conclusion that the agency relationship concluded in 2016. It further contends that it had a legitimate expectation for the underwriter to uphold the contractual agreement to pay commissions as initially agreed upon. To bolster this argument, the appellant references the Supreme Court decision in *Communications Commission of Kenya and 5 Others v Royal Media Services and 5 Others*, SC Petition Nos. 14, 14A, 14B & 14C of 2014, emphasizing the principle of legitimate expectation in contractual relationships.
8. The appellant argues that the respondent and the Tribunal violated its legitimate expectation concerning the terms provided by statute and established practices within the insurance industry regarding the payment of commissions. It contends that the underwriter should be estopped from renegeing on the representations it made in this regard, which the appellant relied upon to their detriment and disadvantage.
9. In a rejoinder to the appeal, the respondent argues that the agency relationship between the appellant and the underwriter ended when the appellant permitted the underwriter to deal directly with RMS starting in 2016.
10. The respondent also relies on the Tribunal's finding that the appellant had not provided any services for the underwriter in the three years leading up to the dispute. Additionally, the appellant did not participate in the tender process for supplying medical insurance coverage to RMS in 2019, but the underwriter itself had submitted a bid for these services. According to the respondent, these actions and communications constituted a termination of the agency relationship by notice.
11. On promissory estoppel, the respondent urges that this court cannot make any finding on the same as the issue was not raised before the Tribunal.
12. The first question is whether there was a principle agent relationship between the parties. It is not denied that there was no formal agreement between the underwriter and the appellant. In my view, the Tribunal correctly analyzed the evidence on record, including the duration of dealings between the underwriter and the appellant and the evidence of commission payments. It came to the correct conclusion that there existed an agency relationship between the parties, evidenced by their conduct.



13. Based on the evidence presented to this court, the commission that the appellant claims is specifically for the years 2019 and 2020. It is undisputed that the commission for the years 2015 to 2018 was paid. The central issue is whether the underwriter created a legitimate expectation that the appellant would receive payment for the commissions in 2019 and 2020.
14. The answer to this question partly depends on determining when the agency agreement between the appellant and the underwriter was terminated. The business under the agency contract was subject to annual renewal. This fact is undisputed. It is also clear that the contract was for an indefinite duration.
15. According to the *Halsbury's Laws of England*, Volume 1 [2008], the termination of an unwritten and indefinite contract would require notice of reasonable length. Paragraph 177 thereof provides as follows:

“Obviously, as a result of continued performance the parties are not bound to each other forever. As in any contract for an indefinite period, either party has the right to unilaterally end the contract by giving notice of reasonable length.”
16. A letter at page 42 of the Record of Appeal confirms that RMS made a request to the underwriter to be covered directly from April 2015. Subsequently a meeting was held between RMS and the underwriter. This is confirmed by the e-mail of 11/3/2019, at page 51 of the Record of Appeal. At the meeting the parties resolved that Kenfirm (the appellant) would be maintained as the agent on record since RMS had not intimated that they wanted to introduce a new agent. It was further agreed that the underwriter would deal directly with RMS. This finding is confirmed by the Tribunal at paragraphs 45 and 46 of its judgment.
17. The appellant has not denied that during the 3 years 2015-2018, he was not actively engaged as an agent for the RMS business. The evidence on record shows that the underwriter explicitly notified the appellant in 2015 that it would be dealing directly with RMS. This communication was clear and unambiguous, indicating a shift in the business arrangement and effectively terminating the previous agency relationship. The appellant did not challenge this change at the time, nor did it take any steps to assert its role in the subsequent years.
18. The ex gratia commissions paid to the appellant for the business in 2015 up to 2018 appears to have been given out of goodwill and not as a matter of right or contractual obligation. Such payments do not establish a legal basis for future claims. They were in my view, a recognition of past services rather than an indication of continued entitlement.
19. Subsequently, the fact that RMS floated a tender for the 2019 medical insurance cover and that the appellant did not participate in this process further underscores the termination of the previous business arrangement. The tender process indicated that the business was open to competitive bidding, and the appellant's non-participation demonstrated an acknowledgment of the changed circumstances.
20. Having so found, the next question is whether the payment of commissions for the period 2015-2018 created a legitimate expectation for commissions to be paid in 2019 and 2020.
21. It is a cardinal principle of agency law that an agent is entitled to commission on contracts concluded with customers during the period of the agency contract. Once the contract comes to an end the agency cannot claim commission. In the present circumstances the appellant was in fact remunerated for the 3 year transition period up to 2018 for its effort in the RMS business.



22. In light of what I have already observed regarding the termination of the agreement by conduct, it follows that there was no contract between the agent and the underwriter to entitle the appellant to commission. In this regard I agree with the Tribunal on its finding that the commission payable to the appellant was properly ended. There was no express promise to pay commission for the years 2019 and 2020 and as such the appellant had no legitimate expectation as alleged. To hold otherwise would result to unjust enrichment on the appellant. Legitimate expectation cannot be based on passive receipt of benefits without corresponding performance of duties.
23. On the doctrine of estoppel, contrary to the submissions by the respondent, it is clear that the Tribunal considered the same at paragraphs 39-44 of its judgment. I agree with the Tribunal that the underwriter waived his right of estoppel when he allowed the underwriter for 3 years to deal directly with RMS. At paragraph 42 of the judgment the Tribunal notes that:
- “The appellant submitted that it gave the insurer authority to act directly with Royal Media Services in the process of payment of premiums and sending of renewal notices in 2016.”
24. The appellant has in its argument referred to trade usage. I take the position that for the court to uphold any such trade usage, it must be one that is reasonable, practical and just. In the circumstances before this court, the appellant appears to be insinuating that there is a custom of trade within the insurance industry for payment of commission to an agent in perpetuity. Such a custom would be detrimental to the freedom of parties to contract therefore unconscionable.

Disposition

25. Accordingly, and for the reasons that I have stated, the appeal is dismissed with costs, and the decision of the Insurance Appeals Tribunal dated 12th October 2020 is upheld.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 26TH DAY OF JULY 2024.

F. MUGAMBI

JUDGE

