Jubilee Holdings Limited & another v Bupa Insurance Services Limited & another (Civil Suit 2 of 2016) [2023] KEHC 21840 (KLR) (Commercial and Tax) (25 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21840 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 2 OF 2016

A MSHILA, J

AUGUST 25, 2023

BETWEEN

JUBILEE HOLDINGS LIMITED .... 1ST PLAINTIFF

JUBILEE INSURANCE COMPANY OF KENYA LIMITED .... 2ND PLAINTIFF

AND

BUPA INSURANCE SERVICES LIMITED .... 1ST DEFENDANT

BUPA INSURANCE LIMITED .... 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs herein brought this suit against the Defendants for breach of contract and breach of duty of care for alleged failure to honour payment of 300,000 GBP. According to the Plaint dated 31st December, 2015, the parties entered into a business arrangement under a Memorandum of Understanding on 5th December 2012 to facilitate and promote cooperation between the parties in respect of distribution, sales, marketing, administration and management of international insurance policies and travel products in Kenya and other territories that were to be agreed upon by the parties.

2. The Memorandum of Understanding provided for a phased approach in carrying out the business objectives including entering into a Distribution Agreement for international private medical insurance in Kenya and a Trademark Licence for the use of the Defendant's trademark in Kenya. The parties executed a Distribution Agreement dated 5th December 2012 which was later amended on 5th September, 2013. The Trademark Agreement was signed on 6th December, 2012.

3. On 12th September, 2012 the parties met to discuss a risk share approach. The Plaintiffs averred that the parties agreed that the Plaintiffs would be entitled to a 2.5% commission on all business placed in Kenya on behalf of the Defendants. However in another meeting in February, 2014 the Defendants suggested

that the commission be referred to as "capacity fee" instead of "umbrella fee" to avoid compliance challenges due to their anti-bribery policy.

4. On 14th February, 2014 the Defendants sent a Schedule of Supply and standard conditions of business via email stating at Clause 8 that the Defendants would pay the Plaintiffs a fee of 60,000 GBP per month until 1st July 2014 or until a risk share agreement between the parties is implemented in Kenya, whichever was the earlier to occur.

5. As at 1st July 2014, no risk share agreement had been implemented and therefore the Defendants were under the obligation to pay the Plaintiffs the promised sum of 60,000 GBP per month from February to June, 2014 amounting to 300,000 GBP. The business relationship between the parties ended on 8th September, 2014 at the instance of the Defendants.

6. The Defendants filed a Defence dated 26th July, 2016 denying the entire claim. They contended that payment of any commission fee was subject to the parties finalizing a separate contract for services. The possibility of entering into a contract was discussed but was not finalized nor was any agreement signed by the parties. There were mere negotiations but no agreement was reached. The only agreement that was signed by the parties was the Distribution Agreement dated 5th December 2012 that was terminated on 8th September, 2014.

Plaintiff's Case

7. At the hearing the Plaintiffs called one witness and the Defendants also relied on the evidence of one witness. The evidence of the Plaintiffs' witness was heard by Hon. Lady Justice Grace Nzioka and the defence witness was heard before this court. PW1, Catherine Njeri Karori, stated that she was the 2nd Plaintiff's General Manager until 2019. She was involved in the negotiations between the Plaintiff and the Defendant. The negotiations resulted into a Distribution Agreement dated 5th December 2012 which was later amended on 5th September, 2013. There was a meeting on 12th September 2013 to discuss risk share and how to implement the risk share within the set time. The parties also agreed on commission fees to be paid to the Defendants.

8. Subsequent meetings followed on the commission payable to the Defendants. She made reference to a series of emails correspondence on service agreement which was in the 2nd phase in relation to risk sharing. Risk sharing was to be achieved by 1st July, 2014.

9. In the meeting held in 2014, the commission rate was agreed at 2.5%. There was also discussion on the umbrella fee which the Defendants later preferred to call capacity fees. One Hellen Love from the Defendants later sent an email containing a service agreement for review. The fee payable was 300,000 GBP. The said Hellen Love gave instructions on how the breakdown of costs should be done and that the expenditure should not exceed 60,000 GBP per month. The Plaintiffs sent invoices as guided by the Defendants but the Defendants did not honour them.

Defendant's Case

10. Dw1, Ian Malcom Cairns, stated that he was the head of market development for the 2nd Defendant between 2012 and 2015. Apart from the Distribution Agreement dated 5th December, 2012 and its amendment on 5th September, 2013, there are no other agreements between the parties. The parties were negotiating to implement a risk share agreement and subsequently a contract for services but these were not concluded. The negotiations were carried out through meetings, telephone calls and various email correspondences between the parties.

11. On 10th September, 2013, the parties launched the BUPA-Jubilee Explorer Product and on the following day the parties held a meeting to discuss the modalities and operational matters in implementing the partnership objectives relating to risk share arrangements. Due to the Plaintiff's unreasonable demands on increased commission, the Defendant's team was passive and nothing was agreed between the parties. The parties met again on 12th September, 2013 to continue with the discussion but no agreement was reached.

12. DW1 returned to Kenya for other meetings on 9th and 10th December, 2013 to continue the discussion on risk share and additional fees. Alternatives to the disagreed additional commission were considered. The Defendants proposed that the Plaintiffs follow UK Financial Services Authority standards rather than local standards of compliance and governance which would involve additional expense and effort but the Defendants would compensate the Plaintiffs for the additional cost based on evidence of delivery of services and the incurred costs. A contract of service was discussed to cover these aspects which would include a service fee of not more than 60,000 GBP per month for 5 months amounting to 300,000 GBP. This was however not a substitute to the Plaintiff's proposed extension of the distribution services commission (umbrella fee).

13. In cross examination, DW1 stated that there was no contract between the parties unless it was signed. A contract must be executed and consideration paid. However, in a letter dated 11th August, 2014 the Defendants agreed to make conditional payments even when there was no signed contract. The payments would be contribution towards expenses actually incurred by the Plaintiffs during the activity to implement the risk share negotiations between February and April, 2014.

14. DW1 stated that the schedule for payment shared by the Defendants to the Plaintiffs was a mere template and did not form part of the agreement. The document was not an offer but a discussion document. Negotiations and conversations were still ongoing.

15. After the conclusion of the hearing the parties were directed to file their respective written submissions; a summary is as follows;-

The Plaintiffs' Submissions

16. The 1st and 2nd Plaintiffs are both limited liability companies incorporated in Kenya, with the 2nd Plaintiff being a wholly owned subsidiary of the 1st Plaintiff. The primary business of both the Plaintiffs is the provision of various classes of insurance services to members of the public. The 2nd Plaintiff is the entity that carried out the business activities arising from the contracts entered into by the 1st Plaintiff and the Defendants.

17. On 5th December 2012, the 1st Plaintiff entered into a business arrangement with the Defendants through a Memorandum of Understanding which set out the means through which the business objectives for the companies would be met, including setting up a strategic partnership in connection with the distribution, sale, marketing, administration and management of international insurance policies and travel products in Kenya and beyond. The parties agreed on a phased approach in fulfilling their objectives including distribution of existing Bupa International Policies, co-branding certain existing documentation, expansion of the first phase of the relationship including entering into a Distribution Agreement for international private medical insurance in Kenya, and a Trademark License for the use of the Defendants' Trademark in Kenya. This phase would then be followed by the development of the strategic partnership between the parties including a reinsurance arrangement or other risk-share based alliance.

18. The parties agreed to invest in the ongoing management of their relationship and in this regard agreed to be meeting quarterly to review their performance and raise any issues, as well as to agree on the appropriate management information to be reported on a regular basis. Under the phased approach in the MOU, the parties entered into a Distribution Agreement dated 5th December, 2012 which was later amended on 5th September, 2013. The Defendants also gave the Plaintiffs a Trademark Licence on 6th December, 2012.

19. The Plaintiffs expressed dissatisfaction in the existing remuneration in a joint meeting of the parties on 12th September, 2013. The parties discussed the risk share approach contemplated in the MOU among other things. Parties agreed that the Plaintiffs would be entitled to a 2.5% commission on all business placed in Kenya on behalf of the Defendants.

20. In a subsequent meeting in February, 2014, the Defendants stated that the 2.5% commission which amounted to 300,000 GBP would be referred to as "capacity fee" instead of "umbrella fee" to avoid compliance challenges. The amount would be payable from February 2014. One Hellen Love from the Defendants subsequently sent an email dated 14th February, 2014 forwarding a Schedule of Supply and the Defendants Conditions of Business that confirmed that the Defendants would be paying the Plaintiffs a fee of 60,000 GBP per month from February until 1st July 2014 or until a risk-share agreement between the parties was implemented in Kenya, whichever occurred first.

21. Email correspondence between the parties detailed the contents of the invoices to be raised. The Plaintiffs accordingly raised invoices in the sum of 300,000 GBP for the months of February to June 2014. Despite making repeated follow-ups and demands for payment, the Defendants refused to honour their part of the bargain.

22. The Plaintiffs relied on a number of authorities including the Court of Appeal decision in Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited (2017)eKLR which endorsed the decision of the Supreme Court of the United Kingdom in RTS Flexible Systems Ltd v MOlkerei Alois Muller GmbH & Co KG (UK Production) (2010) UKSC14, [45] where it was held that whether there was a binding contract between the parties depends on whether there was consideration of what was communicated between them by words or conduct and whether there was an intention to create legal relations. This is so even if certain terms of economic or other significance had not been finalized.

23. The Plaintiffs cited Mamta Peeush Mahajan v Yashwant Kumari Mahajan (2017)eKLR where it was held that an agreement need not be in any special form or in writing unless statute expressly provided for it.

24. The Plaintiffs also relied on Eldo City Ltd v Com Products Kenya Ltd & Another (2013)eKLR where it was observed that it would not be prudent in the world of economics to allow a party to pull out of a transaction when parties were already at consensus ad idem. The freedom to pull out of a transaction should be limited up to the point the parties were still negotiating and once the terms had been agreed and settled, that freedom should dissipate.

25. The Plaintiffs contended that they adduced cogent and credible evidence and urged this court to enter judgment in their favour and grant the prayers sought.

The Defendants' Submissions

26. Placing reliance on Section 107 of the *Evidence Act*, the Defendants submitted that the burden of proof rests on the Plaintiffs to prove the allegations made in the case. The payment of any commission fee as alleged by the Plaintiffs was subject to the parties finalizing a separate contract for services to

which a commission could be applied. The possibility of entering into a contract was discussed but was never finalized nor was any agreement reached at all for the claims made by the Plaintiffs. The parties had a non-exclusive Distribution Agreement dated 5th December 2012 which created a symbiotic relationship for the facilitation of the distribution, sale, marketing, administration and management of international insurance and travel products in Kenya and other territories. The agreement was amended on 5th September 2013 but was eventually terminated. No other agreement was entered into by the parties.

27. The parties engaged in negotiations to implement a risk share agreement and subsequently a contract for services but none was concluded. The meeting of 11th September, 2013 at Jubilee House was to discuss the modalities and operational matters in implementing the partnership objectives relating to potential risk share arrangements. The Plaintiffs forcefully sought to demand that the Distribution Services Commission referred to in Para 2 of Part 3 of Schedule 1 of the Distribution Agreement dated 5th December 2012 be extended to apply to not only the business which the Plaintiffs effected but also the new and existing businesses effected by Retained Distributors. The retained business constituted the majority of the Defendants' business in Kenya and was specifically excluded from the commission arrangements in place with the Plaintiffs.

28. The Defendants had determined that the inclusion of the retained business within the scope of the 2.5% Distribution Services Commission would never have been commercially viable for the Defendants as this would have directly reduced the margins of the Defendants' existing business in Kenya. Further the demand for the commission on business which the Plaintiffs would have no part was likely to be in contravention of the Defendants' anti-bribery policies.

29. In the meeting of 12th September, 2013 at Lord Erroll Country Club, Nairobi, the Defendants still refused the extension of the 2.5% Distribution Services Commission. Between 9th and 10th December, 2013, DW1 engaged with the Plaintiffs on possible continuation of the arrangement with them and to further negotiations on a risk share agreement. By this time, the Plaintiff's proposal for the extension of the 2.5% Distribution Services Commission to include retained business was referred to as "umbrella fee". Still the Defendants restated their position that they were unable to agree to the proposal because it was commercially not viable and against the Defendants' anti-bribery policy.

30. However, an alternative arrangement was contemplated. The Defendants suggested that the Plaintiff operate under UK Financial Services Authority standards of compliance rather than local standards and the Defendants would compensate the Plaintiffs for any additional expenses. Parties discussed about a contract for service that would cover these aspects which would include a service fee of not more than 60,000 GBP per month for 5 months totaling 300,000 GBP. The contract for services was not meant to be a substitute for the Plaintiffs' proposed extension of the Distribution Services Commission (umbrella fee).

31. The Defendants relied on Garvey v Richards {2011} JMCA 16 where it was held that three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationship and consideration.

32. The case of Benjamin Ayiro Shiraku v Fozia Mohamed (2012)eKLR was also cited where it was observed that where one party has, by his words or conduct, made the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him.

33. The Defendants submitted that the Plaintiffs seek to rely on conditional, tentative oral representation borne out of negotiations as forming a contract between the parties. The Plaintiffs' case must fail because they have not met the threshold for an oral contract. They relied on Ali Abid Mohamed v Kenya Shell & Company Limited (2017)eKLR where it was held that a contract between parties can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been been concluded.

34. The Defendants reiterated that although a draft Schedule of Supply was shared, it was not accepted by the Plaintiffs and hence did not bind anyone as a contract. It was still under review to be completed. Clause 9 of the Schedule of Supply required that a Purchase Order must be obtained from the Defendants before work commenced and the Plaintiffs did not seek for the said Purchase Order. There was therefore no work carried out by the Plaintiffs to warrant the Defendants to issue a purchase order.

35. The Defendants concluded that the Plaintiffs failed to demonstrate entitlement to the orders sought and that the discussions between the parties did not result in any agreement on which the Plaintiffs' claim can be based.

Issues For Determination

36. From the pleadings, the evidence adduced and the submissions, the following are the issues this court has framed for determination;

    a. Whether there was an agreement between the parties for the monthly payment of 60,000 GBP for the months of February to June, 2014 amounting to 300,000 GBP;

    b. Whether there was breach of the agreement and if so the necessary remedy to be issued.

Analysis

Whether there was an agreement between the parties for the monthly payment of 60,000 GBP for the months of February to June, 2014 amounting to 300,000 GBP

37. It is not in contention that parties had a continuing business relationship grounded on legal documents such as an MOU, a Distribution Agreement dated 5th December 2012 but later amended on 5th September 2013 and a Trademark Licence granted to the Plaintiffs on 6th December, 2012. A series of meetings took place in furtherance of this relationship. Parties agreed on the occurrences of these meetings and the respective dates. Parties however disagreed on some of the resolutions of these meetings and the agenda. Most specifically, the Defendants disagreed about the meeting items on the agenda of the meeting of 12th September, 2013 at Lord Errol where it was agreed that the Plaintiffs would be entitled to earn 2.5% commission on all business placed in Kenya including all retained intermediaries for the Defendants.

38. The Plaintiffs stated that it was on the basis of their dissatisfaction expressed in the said meeting that in a subsequent meeting in February, 2014, the Defendants stated that the 2.5% commission which amounted to 300,000 GBP would be referred to as "capacity fee" instead of "umbrella fee" to avoid compliance challenges. The amount would be payable from February to June, 2014. The Defendants shared a Schedule of Supply confirming the 60,000 GBP to be paid monthly from February to June, 2014.

39. The Defendants on the other hand contested the Plaintiff's claim and stated that the draft Schedule of Supply was not accepted by the Plaintiffs and hence did not bind anyone as a contract. It was still under review to be completed.

40. Whether there was an agreement for payment of 60,000 per month between February and June, 2014 depends on the conduct of the parties as demonstrated in the evidence adduced during the trial. The Court of Appeal in the case Mbuthia Macharia v Annah Mutua & Another [2017] eKLR discussed the burden of proof and stated thus:

> (16) "The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence..."

41. PW1 testified and produced a bundle of documents admitted as exhibit (PExh.1). Although DW1 did not produce any documents in support of the Defendants' case, it is clear that the Defendants also rely on some of the documents in the Plaintiffs' bundle of documents in support of their case. This court will analyse the evidence in totality and determine whether indeed there was an agreement for the payment of 60,000 GBP per month from February to June, 2014. Since there is no express contract for the said agreement in this matter, the legal position is as follows;-

42. In William Muthee Muthami vs. Bank of Baroda (2014) eKLR the court observed that: -

> 'In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.'

43. In the case of Rose and Frank Co. vs. J R Crompton & Bros Ltd (1923) 2 KB 293, Atkin, LJ stated that: -

> 'To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly.'

Lord Clarke in the case of RTS Flexible Systems Ltd vs. Molkerei Alois Muller GmbH (2010) UKSC 14 stated that: -

> '...The general principles are not in doubt. Whether there was a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.'

In the case of Lamb vs. Evans (1893) 1 Ch 218 the Court stated that: -

> '......What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile......'

44. The Court of Appeal in the case of Ali Abdi Mohamed vs. Kenya Shell & Company Limited (2017) eKLR stated that: -

> '11. It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded….'

45. The minutes of the meeting of 12th September, 2013 adduced by PW1 indicate that a discussion was made and it was agreed that the Plaintiffs would be entitled to a 2.5% commission on all business placed in Kenya on behalf of the Defendants. This may not have been realized but it indicates dissatisfaction with the then existing remuneration. DW1 merely denied the minutes but did not provide countering evidence. It is plausible that this dissatisfaction formed the basis for the current claim which was later confirmed in email correspondences between the parties and the letters exchanged.

46. In a letter dated 8th May, 2014 from the Plaintiffs to the Defendants which was admitted in evidence and was not controverted, the Plaintiffs stated;-

> " On the request of the BI we agreed a "capacity fee" instead of an 'umbrella fee'. It was agreed that this fee was payable from February. To date we have not received any monies despite 2 invoices submitted to Bupa."

47. This 2014 letter indicates that the Defendants were aware of the Plaintiffs' claim even before their letter dated 9th June, 2014 terminating the business relationship. In the response to the termination letter by the Defendants, the Plaintiffs reiterated their claim as follows in their letter dated 8th July, 2014;-

> " We are working to wrap up all the outstanding matters during the notice period of 3 months and of the major outstanding issues is the payment of GBP 300,000 by Bupa International to Jubilee Insurance, being the umbrella fee."

48. The Defendants only denied the umbrella fee in their letter dated 11th August, 2014. They however admitted issuing a draft contract in February, 2014 which was yet to be concluded. Curiously in the same letter, the Defendants admitted some liability for payment as follows;-

> " Notwithstanding the fact that no agreement was entered into, and there is no contractual obligation on Bupa in this respect, Bupa may be willing to consider a contribution towards expenses actually and properly incurred and evidenced by Jubilee. Activity to implement risk share and local servicing commenced in February, 2014 and ran until mid-April."

49. In the Plaintiff's letter dated 28th August, 2014 the Plaintiff's reminded the Defendants of their position on the umbrella fee as follows;-

> " 3. In February 2014, during your visit to Nairobi, you met with Mike and I to discuss the risk share model. At this meeting you asserted that the payment could not be processed as an umbrella fee due to compliance challenges and therefore proposed to call it a capacity fee. On your request, we agreed to the same. It was also agreed that this capacity fee was payable from February, 2014. Following this meeting, we received an email datyed 14th February 2014 from Helen Love forwarding us a Schedule of Supply as well as Bupa's standard

terms and conditions of business. Clause 8 of the Schedule of Supply addresses fees and states that:

> Bupa shall pay the supplier a fee of sixty thousand pounds per month until 1st July 2014 or until the risk share agreement has been implemented in Kenya between BUPA and Jubilee whichever is the earlier to occur. For the avoidance of doubt the maximum payment for the services shall not exceed three hundred thousand pounds.””

50. Indeed email correspondence confirms the Defendants’ acknowledgment of this fact. In an email dated 27th March, 2014, the said Hellen Love wrote to the Plaintiffs directing that invoices cannot include contingency items and that all costs should amount to 60,000 GBP. This court notes that there were continuing discussions on risk share between the parties but still the parties were at consensus ad idem on the payment of 60,000 GBP between February and June, 2014 pending the continuing discussions. The Schedule of Supply sent to the Plaintiffs unequivocally states;-

> “ Fee
>
> Bupa shall pay Supplier a fee of sixty thousand pounds per month until 1st July, 2014 or until the risk share agreement has been implemented in Kenya between Bupa and Jubilee, whichever is the earlier to occur. For avoidance of doubt, the maximum payment for the services shall not exceed three hundred thousand pounds.”

51. This court is satisfied that the correspondence between the parties and the Schedule of Supply shared by the Defendants satisfactorily prove that there was an implied binding agreement for the payment of 60,000 GBP between February and June, 2014. The details of the itemized costs are evidenced in the invoices tendered as evidence by PW1.

Whether there was breach of the agreement and if so the necessary remedy to be issued

52. Having concluded that there was an implied agreement for payment of 60,000 GBP per month between February and June, 2014, the Defendants’ failure to honour their obligation amounted to a breach of contract. The proper remedy for breach of contract is an award for special damages which this court is satisfied that the Plaintiffs specifically pleaded and proved to be 300,000 GBP and the court shall make this award.

53. The Plaintiffs are also entitled to interest at court’s rate on the said sum from the date of filing suit until payment in full.

Findings And Determination

54. From the forgoing this court makes the following findings and determinations;

    i. This court finds that the Plaintiffs proved its claim on the existence of an implied binding agreement as between the Plaintiffs and Defendants to the desired threshold.

    ii. The court finds that the Plaintiffs also proved that the Defendants breached the agreement; and is found to be entitled to an award of special damages.

    iii. Judgment is hereby entered in favour of the Plaintiffs against the Defendants jointly and severally for special damages in the sum of 300,000 GBP.

    iv. There shall be interest applicable thereon at court rates from the date of filing suit.

v. The Defendants are hereby condemned to pay costs of the suit

Orders accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 25TH DAY OF AUGUST, 2023.

A. MSHILA

JUDGE