



West Media Limited v Catherine Naliaka t/a Everexcelling Ventures (Commercial Appeal E037 of 2023) [2023] KEHC 24701 (KLR) (Commercial and Tax) (31 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24701 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E037 OF 2023**

**DAS MAJANJA, J
OCTOBER 31, 2023**

BETWEEN

WEST MEDIA LIMITED APPELLANT

AND

CATHERINE NALIAKA T/A EVEREXCELLING VENTURES RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. M. Mutua, Adjudicator/RM dated 7th March 2022 at the Small Claims Court at Nairobi SCC Claim No. 1097 of 2021)

JUDGMENT

Introduction and Background

1. This is an appeal against the judgment of the Small Claims Court dated 07.03.2022 where the court allowed the Respondent's Claim and entered judgment against the Appellant of Kshs. 349,137.93.
2. The Respondent's case as set out in her Statement of Claim dated 03.09.2021 was that the parties entered into an agency agreement dated 02.02.2021 where the Appellant agreed to pay her Kshs. 349,137.93 after the Respondent procured the Insurance Regulatory Authority to advertise with the Appellant. That despite sourcing this business, the Appellant had refused to pay her the Kshs. 349,137.93 which she claimed.
3. In its response to the Claim, the Appellant denied the agreement alleged to be the basis of the claim and that it owed the Respondent any money. That the alleged agency agreement relied on by the Respondent was not signed by or on behalf of the Appellant to legally bind the Appellant. The Appellant contended that the Insurance Regulatory Authority allegedly brought by the Respondent to the Appellant for the advertising services had always been the Appellant's client since 2012 and there exists an agreement between the Insurance Regulatory Authority and the Appellant for those



advertising services and other media services. The Appellant stated that the Respondent did not act as its agent in respect of the advertising services for Insurance Regulatory Authority as claimed and that in the transaction, the Respondent was a representative of the Insurance Regulatory Authority and if there was any payment to be made to the Respondent, it should be by and/or from the Insurance Regulatory Authority on whose behalf the Respondent acted as a representative. The Appellant thus urged the court to dismiss the Respondent's claim.

4. The matter was set down for hearing. The Respondent (CW 1) testified while the Appellant called its Marketing Manager, Anne Mwikali (RW 1) as its witness. After considering the written submissions, the trial court rendered its judgment on 07.03.2022. The trial court stated that it was evident that there was an agency agreement between the parties as the Appellant had not reported to the police any incidence of fraud on the part of the Respondent. That the Respondent had also produced an order form dated 25.03.2021 from the Insurance Regulatory Authority to the Appellant for a sum of Kshs.1,939,655.17 less VAT and that the form was approved by the Respondent on behalf of the Appellant. The learned Adjudicator noted that RW 1 did not object to having knowledge of the order form and that she only stated that Insurance Regulatory Authority was an existing client of the Appellant. That she produced a letter dated 14.09.2012 which was addressed to her from the Insurance Regulatory Authority but she declined to produce an agreement between the Appellant and the Insurance Regulatory Authority stating that the agreement was confidential. The learned Adjudicator further noted that RW 1 also did not call a representative of the Insurance Regulatory Authority to confirm the existing relationship between them if there was any.
5. The Adjudicator thus took the view that the Respondent was an agent of the Appellant, that she sourced business for the Appellant but the Appellant did not wish to pay her the commission. That the order form from the Insurance Regulatory Authority was signed by the Respondent on behalf of the Appellant and thus it was evident that she should be paid her commission. The Adjudicator thus concluded that the Respondent had proved her case against the Appellant on a balance of probabilities and consequently awarded her commission at the rate of 18% as agreed by the parties on the order form dated 25.03.2021 for Kshs.1,939,655.17. The court entered judgment for the Respondent against the Appellant for the sum of Kshs. 349,137.93 together with costs of the claim and interest from the date of filing the claim.
6. The Appellant appeals against the judgment based on the Memorandum of Appeal dated 28.03.2022. The parties have also filed written submissions in support of their respective positions which are along the lines I have highlighted above and which I shall consider in my determination below.

Analysis and Determination

7. This court's jurisdiction on appeals from the Small Claims Court is limited to matters of law as provided for under section 38(1) of the *Small Claims Court Act*, 2016. A court limited to matters of law is not permitted to substitute the subordinate court's decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them (John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR).
8. Even though the Appellant has raised 13 grounds in its appeal, it has consolidated the same into three primary issues; whether a valid agency agreement existed between the parties, whether the Respondent was acting as the Insurance Regulatory Authority's agent in the transaction and whether the Insurance Regulatory Authority was an existing client.



9. An agency relationship and the consent of such a relationship can be inferred from the conduct of the parties and need not be in writing. Reynolds in Bowstead on Agency (15th Ed.), p.1 states that:

Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf, and the other of whom similarly consents so to act or so acts. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is the agent. Any person other than the principal and the agent may be referred to as a third party.

10. From the record, there is a letter dated 01.02.2021 written by the Moses Misoga expressly appointing the Respondent as an agent of the Appellant for “advertising revenue sourcing”. Though RW 1 denied knowing the said Moses Misoga, she did not claim that he was an imposter of the Appellant or deny that the said rubber stamp indicated therein belonged to the Appellant. There is also the order form dated 25.03.2021 which RW 1 did not deny indicated that the Respondent was the Insurance Regulatory Authority’s representative to the Appellant. She also did not deny that they were paid the amounts indicated in the said order form. All these put together can only lead to a probative conclusion on a balance of probabilities that there was at least an implied agency relationship between the parties and the subordinate court did not err when it concluded as such. Indeed, a valid agency agreement existed between the parties.
11. This finding segues into the issue whether there was a valid written agency agreement between the parties. The Appellant submits that the one presented by the Respondent was not signed by the Appellant and that one Moses Misoga purported to sign as witness to a non-existent signature of the Appellant. It faults the trial court for failing to interrogate whether the Appellant did in fact sign the said agreement and if not whether the said agreement bound the Appellant who did not sign it. That the absence of the Appellant’s signature on the impugned agency agreement is a clear testament that it cannot be bound by the terms and conditions embodied in that document. It relies on the Court of Appeal’s decision in *Kukal Properties Development Limited v Tafazzal H. Maloo & 3 Others* [1993] eKLR.
12. In rebuttal, the Respondent submits that RW 1 acknowledged that the rubber stamp used on the exhibits produced by the Respondent were genuine and authentic and they belonged to the Appellant. Further, that the order form of 25.03.2023 resulted in the Appellant being paid the sum indicated thereon which all indicate that there was an agency agreement that gave rise to the Respondent’s claim.
13. I have gone through record, more so the impugned agency agreement dated 02.02.2021 and I note it is stamped with the Appellant’s rubberstamp and signed by Moses Misoga as a witness. Having reached the conclusion that there was an agency agreement, the agreement dated 02.02.2021 cannot be read in isolation. Even though it is not signed, it is clear that the parties intended to be bound by it and acted on its contents as evidenced by the fact that the Appellant through its agent Moses Misoga wrote to the Respondent the letter dated 01.02.2021 appointing the Respondent as its agent. This was followed by the Agreement which was executed by the Respondent on 02.02.2021. The Appellant did not execute its part on the same day but affixed its stamp which was witnessed on 23.03.2021 which was two days before the order form dated 25.03.2021 from Insurance Regulatory Authority was issued to the Appellant. All this goes to show that despite the deficiency in execution of the Agreement, the parties intended to be bound by the Agreement and in the absence of proper execution, the court can only imply the written terms as the basis of the relationship.
14. The totality of the evidence is that the Respondent was the Appellant’s agent in the subject transaction and as admitted by RW 1, represented the Insurance Regulatory Authority to the Appellant. There



is also nothing on record to indicate that the Insurance Regulatory Authority was already an existing client of the Appellant. Even if this was so, the same does not negate or dilute the Respondent's involvement in the piece of business that led to the Appellant being paid Kshs. 1,939,655.17. Once it is accepted that the parties were in an agency relationship, the commission payable to the Respondent could only be implied from the document that was forwarded by the Appellant to the Respondent setting out terms of the relationship.

15. Before I conclude this judgment, perhaps it would be important to note that the agreements subject of this suit are not required in law to be in writing. This was the issue in *Kukal Properties Development Limited v Tafazzal H. Maloo & 3 Others* (Supra) where the issue concerned an agreement for the sale of an interest in land which is required by the *Law of Contract Act* (Chapter 23 of the Laws of Kenya) to be in writing signed by both parties hence this decision is inapplicable to this case. Further, there is no requirement in law that all agreements with a company must be under seal and witnessed by a director as required by section 37(2) of the *Companies Act*, 2015. Under section 36 thereof, a contract may be made on behalf of a company by a person acting under the authority of the company express or implied. Further, a company cannot assert any limitations contained in its constitution against a person, such as the Respondent, dealing with it in good faith.
16. Ultimately the parties were in an agency relationship under which the Respondent delivered on her bargain and was entitled to payment on the basis of the agreement dated 02.02.2021. The burden to plead and prove any facts that would invalidate the documents and relationship fell squarely on the Appellant which it failed to discharge. I hold that the Adjudicator came a conclusion that was supported by the evidence and did not err in awarding Kshs. 349,137.93 as the commission payable to the Respondent at 18% of the net sales excluding VAT.

Disposition

17. The appeal is dismissed. The Appellant shall pay the Respondent costs assessed at Kshs. 30,000.00 only.

SIGNED AT DUBAI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2023.

A. MABEYA

JUDGE

