

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL SUIT NO. 12 OF 2017

PHILIP LUTEYA.....PLAINTIFF

VERSUS

AAR INSURANCE KENYA LIMITED.....DEFENDANT

JUDGMENT

1. The suit herein was commenced, on 2nd June 2017, by way of a plaint, of even date, by the plaintiff, against the defendant, a limited liability company, duly incorporated, carrying on insurance business within Kakamega.

2. The principal case by the plaintiff is that he was a business manager of the defendant on a commission basis, and that sometime in September 2016, he procured a tender for the defendant, with the County Government of Kakamega, hereafter referred to as the client, for supply of work benefit injury and group personal injury accident cover, for a sum of Kshs. 34, 861, 937.00. The contract was awarded to the defendant in November 2016, and the plaintiff forwarded the application, and a contract was signed on 30th December 2016, between the defendant and the client, followed by payment of the contract money on 17th February 2017. The plaintiff avers that upon payment of the contract sum, he became entitled to a commission of 20% and a further 1.5% on the contract sum, being Kshs. 6, 972, 395.00 and Kshs. 522, 929.00, making a total of Kshs. 7, 495, 324.0, which the defendant had refused to pay, and he sought judgment in that sum, plus costs. He has attached, to his pleadings, copies of the alleged contract between the defendant and the client, dated 30th December 2016; undated group personal insurance and work injury benefits insurance proposal forms; the unit consultant agreement between the plaintiff and the defendant, dated 25th February 2013; and the sales incentives for 2016.

3. The defendant entered appearance and filed a defence, dated 21st June 2017. It is denied that the plaintiff was the business manager for the defendant for the year 2016, and asserted that the only time the defendant engaged with the plaintiff was in January 2014, when he was terminated as a unit manager, and when he served an acceptance letter to indicate that he would henceforth serve as an independent contractor. It is denied that the plaintiff was involved in any way with the tender to the client. It is averred that the tender was advertised and the defendant duly bid and won the same by submitting the documents required, which did not bear the plaintiff's name. After winning the tender, the defendant received a letter from the client, indicating that their agent was an Eric Oguma, for the purpose of that contract, which the defendant duly confirmed by a letter dated 9th November 2016 and gave further details in another dated 23rd February 2017.

4. The matter was disposed of orally. The plaintiff testified that he had been contracted by the defendant to sell all insurance to the public, and his role included procuring work from public entities on behalf of the defendant. He stated that when the client advertised a tender for provision of work injury benefit and group personal accident cover, he processed the tender application and submitted the same on behalf of the defendant, attended the tender opening ceremony on behalf of the defendant and the tender was eventually awarded to the defendant. He received a copy of the letter of award of tender and submitted it to the Chief Executive Officer of the defendant, who signed the document to signify his acceptance of the document. He thereafter filled the relevant application documents and submitted them to the client, and a contract document was subsequently given to him with his name as the agent or contact person. After that the contract monies were duly paid to the defendant, on 17th February 2017, but he was never paid his commission, hence the suit. During cross-examination, he stated that in 2016/2017 he was an employee of the defendant, working as an independent agent, with the title of business manager. He said that there was no appointment letter, and that he was given business cards instead, for advertisements, adding that the position had no portfolio. He was paid on commission basis, for work done. He described his contract as standard. He produced a number of documents to support his case.

5. The plaintiff called Dr. Dominic Chungari Muteshi as his witness. He was Chief Officer in Charge of Public Finance with the client organization. He testified that the client advertised for work injury benefits and group accident cover, and they received 16 tender quotations. One of them came from the defendant, bid number 14, which was represented by the plaintiff at the opening of the tenders. He stated that the register had a list of agents, and the defendant was represented by two, Joseph Mukai and the plaintiff, of which the plaintiff represented the defendant at the tender opening ceremony. He stated that the agency of the plaintiff as that legal agent for the defendant was given by the defendant, the bid winner. He gave the reference number for the tender as OG/CGKK/Vol/21/016. He stated that it was the defendant that was awarded the tender under the agency of the plaintiff. He said that the contract document did not indicate that the plaintiff was entitled to a commission. He said that the agent was entitled to a commission from the premium paid.

6. The third witness for the plaintiff was John Koveti Lumula, the client's Head of Supply Chain. He said that he had a letter of award of tender and another of confirmation, both dated 7th November 2016, in respect of contract number OG/CGKK/ Vol. 21/016, for a premium of Kshs. 34, 861, 937.00. He explained that the tender documents were usually prepared by the procurement office, and signed by the Chief Officer for Public Service and Administration. He stated that Mr. Stanley Mahindi held that office then, and signed the contract document. He stated that he was the one who filled the work benefits injury form, and signed it. He also stated that the agent was indicated as Eric O. Odhiambo. He stated that the client never appointed the plaintiff as agent. He also referred to a letter from the Chief Executive Officer of the defendant, saying that it did not appoint the plaintiff as one of the contacts for the defendant. He stated that procurement office dealt with tenders, and contracts on agency was a matter between the plaintiff and the defendant. He stated that the contract was generated by the

Client, and was signed on 30th December 2016. Other documents were generated thereafter, which appointed Eric Ouma as agent. He stated that the Client awarded the contract to the defendant, and not the plaintiff. He stated that the contract document had email details of the plaintiff, but not his name. He also said that the name of Eric Ouma was not in the contract document.

7. The case for the defendant opened on 1st December 2020, with Rodgers Wamunga, a regional sales manager with the defendant. He stated that the services of the plaintiff were terminated by a letter dated 27th January 2014. He asserted that there was no other letter appointing him to any other position. He explained that the plaintiff was not a business manager for the defendant, for such a position was in-house and not for independent contractors, and it came with a letter of appointment. He stated that the agent for the purpose of that contract was Eric Odhiambo Ouma. He referred to the letter of 7th November 2016, which awarded the contract and appointed Eric Ouma as agent. He stated that agents were appointed by the Client and not the defendant. He said that he did not see any document that made the plaintiff an agent for the defendant. He said that he did not see the name of the plaintiff in the tender opening register, which, in any event, if his name appeared there, did not entitle anyone to a commission, for a person could only be entitled to a commission if they had been appointed. He stated that the person appointed as agent was one Eric Ouma, going by the letter signed by Mr. Koveti. He stated that the appointment could not be oral, but had to be in writing, and made by the client.

8. At the conclusion of the oral hearings, the parties hereto filed written submissions, which I have read through and noted the arguments made in the two sets of written submissions filed. The issues for determination are those framed by the defendant, that is to say, whether the plaintiff was the defendant's agent for purposes of the tender contract; and whether the plaintiff is entitled to the commission claimed for.

9. From the material placed on record, and the oral testimonies, it is common ground that the defendant's tender for provision of insurance services to the Client of Kakamega was floated, applied for and granted to the defendant. The bone of contention is who acted in the process as agent for the defendant. The plaintiff claims that he did, while the defendant says that he did not.

10. The evidence placed on record appears to place the plaintiff at the centre of the entire process. The officials from the Client, especially the Chief Officer were clear that the plaintiff was the agent for the defendant. The second official adduced fairly convoluted evidence, in one breathe saying that the plaintiff was not the agent according to the records that he had, but admitting that there were other records where his name appeared before they were changed. The plaintiff produced documents that reflected him as the agent for the defendant. Whereas the defendant denied that, and alleged that the person who acted as the agent in the process, whether for the Client or itself, was Eric Ouma, it is curious that the second Official from the Client, from the supply chain management, insisted that Eric Oguma was an agent for the defendant, while the defendant, himself, insisted that Eric Oguma was an agent for the Client. When the defence got their opportunity to give evidence, they did not call the person they claim was their agent or represented them with respect to the tender, whether that person was Eric Ouma or another, more so given that he was the maker of D. Exhibit 5, the contract application form dated 7th January 2017 which was the basis of the contract. They led no evidence as to who prepared the bid and placed it on their behalf. On a balance, I find the case presented by the plaintiff more plausible, and I, therefore, hold and find that he acted as the agent for the defendant.

11. The next consideration is whether he is entitled to a commission for so acting. The contract document was executed as between the defendant and the client, the County Government of Kakamega, and therefore it could not provide for payment of commissions for persons who were not signatories to the contract. The plaintiff produced documents that to show that he had an arrangement with the defendant to source business for it for a commission. I am referring to the Independent Agent Agreement dated 1st February 2014, which is acknowledged by the letter dated 12th June 2018, which terminated it. Under clause 3 of that agreement, the plaintiff is entitled to payment of a commission, at rates that are not clearly spelt out in the agreement, for it refers to the Company's Scales of Commission, which the plaintiff did not furnish the court with.

12. In the end, I find in favour of the plaintiff, to the extent that he has established that he acted as agent for the defendant, however, I shall make no final orders on what he is entitled to by way of commission, as he led no evidence on the commission that was due to him under the contractual arrangements between him and the defendant. The matter shall be disposed of in those terms. The plaintiff shall have costs of the suit. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 6th DAY OF AUGUST, 2021

W. MUSYOKA

JUDGE