



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 480 OF 2015

VICTORIA INSURANCE BROKERS LIMITED.....PLAINTIFF

VERSUS

JUBILEE INSURANCE COMPANY OF KENYA LIMITED.... DEFENDANT

JUDGMENT

1. The commission sought by Victoria Insurance Brokers Limited (**Victor or the Plaintiff**) from Jubilee Insurance Company of Kenya Limited (**Jubilee or the Defendant**) may not be for the typical work of an insurance broker.

2. It is not disputed that Victoria is registered as an Insurance Broker within the meaning of the Insurance Act (Cap. 487 Laws of Kenya) (The Act). Under the provisions of Section 2 of the Act, A Broker means:-

“An intermediary concerned with the placing of insurance business with an insurer or reinsurer for or in expectation of payment by way of brokerage, commission, for or on behalf of an insurer, policy-holder or proposer for insurance or reinsurance and includes a health management organisation; but does not include a person who canvasses and secures reinsurance business from or to an insurer or broker in Kenya so long as that person does not undertake direct insurance business and does not have a place of business, or a resident representative, in Kenya”.

3. As would be clear from that definition, a broker would, typically, place insurance business with an insurer or reinsurer for or on behalf of an insurer, policy-holder or proposed for insurance or reinsurance. In that sense a broker is an agent of the insurer, policy-holder or proposed for insurance or reinsurance. An agent on the other hand means:-

“A person, not being a salaried employee of an insurer who, in consideration of a commission, solicits or procures insurance business for an insurer or broker”

4. In the matter at hand Victoria’s claim is premised on rather unique circumstances. It is averred that on or about July 2015, Jubilee was shortlisted to tender and bid for the provisions of medical insurance cover for members of the Judiciary of Kenya in tender No. JUD/001/2015 – 2016.

5. In the Amended Complaint filed on 27th September 2016, Victoria’s stated case is that Jubilee approached it to broker on its behalf in responding to the tender documents and advising it on the placement of medical insurance cover for the business to which it accepted. It contends that it accepted the offer and that its directors together with a team of consultants prepared and concluded the response to the Judicial Service Commission and generally acted as brokers for Jubilee in the process.

6. It is common cause that Jubilee won the tender. Although the Plaintiff had in its Complaint averred that the annual premium for the cover was Kshs.648,297,521/= for the year 2015/2016 and Kshs.808,056,889/= for the year 2016/2017, it has turned out that the actual premium paid for the year 2016/2017 was Kshs.458,870,319/=. At the hearing, Isaiah Onchonga the managing director of Victoria conceded to this.

7. Victoria claims commission for the supposed role it played in procuring the business at the rate of 10% of the paid insurance which in the Complaint is 145,635,441/= but which would obviously be lower because of the actual premium paid for the year 2016/2017. Victoria also seeks costs of this suit and interest.

8. In Amended Defence dated 17th October 2016 and filed a day after, Jubilee denies that it retained Victoria to be its broker in the material tender or that Victoria acted as its Broker in the tender process. It refutes Victoria’s technical import or input in the process.

9. It denies that the annual premiums for the two periods of insurance are as stated in the Amended Pleadings.

10. In Paragraph 6 it advances the following proposition:-

“6. IN FURTHER answer to the forgoing, the Defendant states that its policy with insurance brokers, which all its brokers know, is that commission is payable to a Broker is also the appointed agent of the procuring entity, full particulars whereof are well known to the Plaintiff”.

11. At the hearing Onchonga, testified for Jubilee and rehashed the contents of the claim. While his evidence will be discussed in detail as is relevant to resolving the dispute herein, some headlines of his testimony can be set out for now.

12. His evidence was that it was Mr. Patrick Tumbo, the then chief executive officer of Jubilee who introduced him to the Company. He spoke to him on phone. And just as the consultative meetings held by his team and officials of Jubilee, he did not have minutes of the conversation.

13. He told Court that a Mr. Kanyingi of Jubilee sent to him the tender documents and his team and that of Jubilee worked on the documents together to finality. He reiterated that Victoria was brought in as experts to assist Jubilee close the business.

14. On the part of Jubilee, one Japheth Ogalloh testified. He is the General Manager, Business Development – Medical in Jubilees’ Medical Department. Whilst he concedes that Victoria approached Jubilee indicating an interest in participating in the tender. There was no agreement engaging Victoria. He emphasizes that Jubilee’s in-house Business Development and Actuarial teams worked on the winning tender documents. He was emphatic that the Plaintiff never worked and prepared the technical proposal of the tender.

15. Later, while under cross-examination, he stated that Bright Idea Insurance Agent helped them source the business and also with necessary market intelligence which they required for purposes of preparing the tender.

16. Parties herein proposed different sets of issues which I have considered in light of the pleadings. The issues presenting themselves for resolution are:-

- i. Did Jubilee contract Victoria as an agent to assist it procure and or win the Judiciary tender?
- ii. If so, did Victoria carry out its part of the contract?
- iii. If the answer to (i) and (ii) are in the affirmative is Victoria entitled to the claim for commission sought?
- iv. What are the appropriate orders to make on costs?

17. Both in the Pleadings and the written statement of Onchonga, Victoria gives the impression that it was Jubilee, through its chief executive officer Mr. Tumbo who invited Jubilee into the contract. Onchonga reiterated this in his oral testimony. He then says that he was advised by Mr. Tumbo to write a letter requesting to participate in the tender. The email is dated 17th July 2015 (D. Exhibit 1 page 1) and reads:-

From: Isaiah Onchonga

Date: 17th July 2015

To: Anthony Kanyingi Kagucia

cc: Enock Okeyo

Subject: MEDICAL TENDER FOR JUDICIARY

Dear Tom,

This is in reference to the above and we wish to advise that we are interested in participating on the above tender on your behalf subject to you meeting the tender requirement.

As earlier discussed we have since confirmed that this tender is going to be Restricted and it is not going to be advertised. Once you pick the document we will provide you with the necessary information to enable you submit a competitive bid.

Kindly Regards,

Isaiah Onchonga / Managing Director

Victoria Insurance Brokers Ltd

18. It is the case of Jubilee that it never confirmed this request to participate. As its counsel submit in its closing arguments, there was no

evidence of the acceptance of offer by the Defendant.

19. Victoria on the other hand asserts that whilst there was no agreement reduced into writing by the parties an inference to be drawn is that Jubilee engaged the services of Victoria and created a legitimate expectation of payment as a broker. In his oral evidence Onchonga makes the argument that:-

“The emails and discussions constitute the oral contract”.

20. I turn to consider the emails exchanged between the parties. It seems undisputed that the Judiciary contacted Jubilee directly advising the latter of the medical tender and asking for certain information. This was through an email of 21st July 2015 at 11.05am. Jubilee provided the information on the same day via email at 6.19pm See (D. Exhibit 1 Page 2).

21. The Judiciary then sent tender documents to Jubilee. Nelly of Jubilee then shared these documents with her colleagues at Jubilee, one of whom was Anthony Kanyingi Kagucia (**Kanyingi**) (See email of 27th July 2015 4.43pm). Kanyingi in turn sent a copy of the email and documents to Onchonga with the remarks “FYI” in an email dated 28th July 2015 at 6.44a.m. Ogalloh told Court that at the time the email was sent to Victoria he was not aware that Kanyingi was communicating to Victoria although he came to learn this later.

22. There was then the following email from Onchonga just two hours after the email of Kanyingi:-

28th July 2015

From: Isaiah Onchonga

To: Anthony Kanyingi Kagucia

Cc: Japheth Ogalloh

I refer to the below subject matter and our discussion earlier in the day. As agreed we are ready to furnish you with the necessary information tomorrow to assist you close this business. The said information will be sent to your office under separate cover and I am of the view that you reconfirm our participation as earlier indicated in our first e-mail.

Best Regards,

Isaiah Onchonga/Managing Director

Victoria Insurance Brokers Limited

23. Two notable things; one, again Victoria asks for confirmation of its participation. This email was copied to Ogalloh who testified on behalf of Jubilee. He neither made comments on it nor was cross-examined on the contents.

24. Anyhow, it was then the evidence of Onchonga that he, together with a team of consultants he had put together, worked in conjunction with Jubilee and put in the tender. Other than stating that Victoria carried out market research, he gave the following testimony on the scope of other works done:-

“Once we were sent the tender document, we summarized it and came up with points for winning the tender. We prepared a 14 page document which constitutes the TOR – Page 32 and 46. This document was made by the Plaintiff. It was derived from the Tender documents and additional features”.

25. Jubilee refutes this and Ogalloh states that Jubilee had the capacity to deal with tender documentation and business prospecting. He gave some details of this capacity as follows:-

[9] That the Defendants in-house Business Development and Actuarial teams manage the tender process. The Business Development team has graduates in business related degrees with professional qualifications in marketing (Chartered Institute of Marketing) and Insurance (Chartered Insurance Institute) while the Actuarial teams has graduates in Bsc. in Actuarial Science.

[10] That the Defendant’s Business Development carries out tender documentation, market sourcing, business prospecting and relationship management with intermediaries while the Actuarial team advises on tender pricing, benefit structure with the attendant costs, anticipated loss ratio of pricing and carries out data analysis. At any one point, the Defendant has at least a team of four employees working on a tender document.

[11] That the Defendant’s Business Development team worked on the technical aspects of the tender which entails interpreting the requirements stated and responding accordingly.

[12] That although the Defendant did in fact win the said tender, the Plaintiff never worked and prepared the technical proposal of the said tender the same having been prepared by the two teams above.

26. If that was all to the matter then the scales would tilt in favour of Jubilee. This is because the Victoria was unable to produce any evidence that its request or offer to participate in the Judiciary tender on behalf or on the side of Jubilee had been accepted by Jubilee. Further, Victoria which bore the onus of proving the existence of the contract had failed to provide evidence of the consultative meetings (say through minutes) and of actual work it had done by way of research or in preparation of the actual document. As it would be the word of Jubilee against Victoria then that evidence without more would be resolved in favour of Jubilee. But there is other evidence.

27. On 2nd August 2015 Kanyingi writes to members of the Jubilee team as follows:-

From: Anthony Kanyingi Kagucia

Sent: 2nd August 2015

To: Nelly Muthiani; Collins Adhaya

Cc: Japheth Ogalloh

Subject: Judiciary 2015

Good Evening

I have just finished a consultative meeting with partners who are assisting on the Judiciary tender.

Attached please see some specific areas we will need to address in order to be deemed to be fully responsive.

Of particular interest is that our document is normally inward looking, communicating to us but not to the intended.

We have been cautioned that the language of the document, and how it is arranged, will be a major contributor to our success or the lack of it.

Details of the budget will be shared later.

Regards

Kanyingi Kagucia

Sales Manager – Medical

He does not say who the partners assisting Jubilee in the tender process are. But I shall return on this.

28. On 5th August 2015 Kanyingi sends out the following email to members of Victoria Insurance,

“Hi,

Below are the tender outcomes”

On 6th August 2015, 9.13am he, again, communicates to them as follows:

From: Anthony Kanyingi Kagucia

6th August 2015

To; Isiah@Victoriainsurance.co.ke,

Isaiahonchonga@gmail.com

FYI

It is however unclear what information had been sought.

29. The same day at 12.10pm, Kanyingi communicates to the same team about the tender;

From: Kanyingi Kagucia

Sent: 6th August 2015

To: Nelly Muthiani; Collins Adhaya

Cc: Japheth Ogalloh

Subject: FW: Judiciary 2015

Good Morning,

In addition to the attached, Kindly see the below pointers that will have a bearing on our consideration.

- i. The contact person on our documents should be the CEO (Salient aspect of the tender that is not clearly indicated).
- ii. After evaluation, there will be a site visit to our call centre.
- iii. MMOL will be a talking point.
- iv. We should consider lifting the cap on glasses for judges.
- v. Debentures have also been a challenge. They currently have an outstanding issue with CIC regarding a decline for a Judge's spouse.
- vi. On family size, the indicated M+5 should not restrict the number of wives. The Judiciary has influential Muslims, one of who is the Chief Kadhi who has made an enquiry on this.
- vii. We should be keen on the number of original and copies required for our hard copy documents.
- viii. In our service methodology document we should capture monthly minute meetings. (These will form the basis for a business case for loading should it become necessary at renewal, which is highly likely).
- ix. In addition to the monthly meetings, we should capture biannual meetings between the Chief Registrar of the Judiciary and our CEO.

Will share more intel as it comes in.

Regards

30. As is now known Jubilee eventually emerged as winner of the tender and Onchonga of Victoria boasts as having received the letter of award from the Judiciary. Under what circumstances did he receive the letter? He give the following evidence:-

“I got the letter of award from the Judiciary. It was addressed to the Defendant. The contact person was Kanyingi. Kanyingi informed me that we had been awarded the business and so he sent me to Judiciary to pick the letter of award”.

Ogalloh was unable to dispute that it was Onchonga who picked the letter and I have no reason to doubt Onchonga on this because there is his letter of 18th August 2015 forwarding the original letter of award to Jubilee (**P. Exhibit 193**)

31. On receipt of the notification of the Award, the Chief Executive wrote an email dated 18th August 2018 at 5.36pm to his team and copied to Onchonga with a special message to him (Onchonga).

Dear All,

Congratulations! Here comes the award letter.

Dear Isaiah,

Well done – Much appreciation.

Cheers!

32. What is one to make of these?

33. From the email of Kanyingi of 2nd August 2015, it was clear that Jubilees' internal team was working with “partners” who were assisting them on the Judiciary tender. Then, whilst, Ogalloh stated that; **“Although Jubilee had capacity to work on tender documentation. We**

require some help in terms of market intelligence in some tender. On the judiciary tender we required help which we received from Bright Ideas”.

34. So unlike what Ogalloh had stated in his evidence in chief (written statement) that his Business Development and Actuarial teams were the ones who worked and prepared the tender proposal, it now turns out that they needed help from third parties. Indeed, in the email of 6th August 2015(**P Exhibit page 168-169**) to team Jubilee, in which he points out what needs to be considered for a successful bid, Kanyingi signed off by telling the team. “will share more intel as it comes in”. I take intel to mean market intelligence.

35. The decisive question has to be who is the third party who helped Jubilee put up the successful bid? Was it Victoria or Bright Ideas as alleged by Jubilee? On this, I have no difficulty resolving that it was Victoria. Unlike Bright Ideas, there is evidence that Victoria was kept in the loop of the tender preparations and considered a player in the process. Indeed, upto the point of cross-examination of its witness, Jubilee had never suggested that any third party, in the least, Bright Ideas had helped it in the tendering process. In the end it was Victoria who picked the tender award letter on behalf of Jubilee. Ultimately the Chief Executive Officer felicitated Isaiah of Victoria in these words:-

“Well done – much appreciated.”

This Court refuses to accept that this happy note was sent out to Victoria simply because of performing a mundane courier duty of picking the award letter from the office of the Chief Registrar of the Judiciary. It must have been for a much more involved role in the preparation of the winning tender bid!

36. In reaching this decision it is not lost to the Court that it was not pleaded by Jubilee nor suggested in evidence or submissions that Kanyingi and Tumbo did not have the authority to bind Jubilee or were otherwise simply acting on their own frolic.

37. As I turn away from this part of the decision, Court needs to attend to the submissions by Jubilee that this suit is an effort by Victoria to sanction an illegality. It is submitted that Victoria deliberately failed to itemize the role it played in the tender award and it is remarked;

“In the wake of procurement laws and existence structure in (sic) how public bodies carry out their tenders. One is left to wonder how exactly the Plaintiff “sourced and/or procured the contract.”

It is then suggested that the claim as pleaded is to the effect that Victoria influenced the award of the tender to the Defendant.

38. However, this Court is unable to invoke the doctrine of *Ex turpi causa non oritur actio* ("from a dishonorable cause an action does not arise") against Victor not only because the illegality was not pleaded by the Defendant (See Order 2, Rule 4 of the Civil Procedure Rules, 2010) but also because there was no proof of illegal conduct on its part. The case of Victoria was premised on technical and expert help which it states was offered to Jubilee.

39. Now, it seems clear that the role played by Victoria was not a brokerage role as envisaged by the Insurance Act. It is in fact common ground that a condition of the tender was that brokerages were not eligible to bid. Yet Victoria, as this Court has observed and held, carried out consultancy work and played a role in the award of the tender. It has not been proved that in so acting, it breached the law. It has been suggested by the lawyers for Victoria, and I have no reason to doubt the proposition, that while Brokers would ordinarily be agents of the insured, there may be occasion or circumstances when a Broker may be the agent of an insurer. For that proposition I was referred to this passage from the Law and the Life Insurance Contract Muriel L. Crawford 7th Edition.

“A broker is a person whose business is to bring buyers and sellers together. An insurance broker is ordinarily a person who procures insurance for those who requests this service. An insurance broker is usually the agent of the applicant for purposes of procuring the insurance or making the application, although the broker may be the agent of the insurer for the purposes, such as collection of the initial premium or delivery of the policy. Life insurance brokers set the policies of a number of life insurers. They often sell other types of insurance as well. Half the states recognize and license life and health insurance brokers. In those states, an insurer can accept applications from, and pay commissions to a licensed broker. Before accepting an application from a person claiming to be a broker, an insurer usually requires proof that the person has a valid broker’s license. This is necessary because an insurer cannot lawfully accept an application that was not lawfully solicited”.

40. Having made that observation, I take the view that in this matter, although Victoria is a regulated Broker, it did not offer brokerage services nor agency services to Jubilee. The services were consultancy in nature in which it offered technical and support services in preparing the winning bid. Indeed, Victoria in its letter of 31st August 2015(**P exhibit page 195**) characterizes the services it offered;

Victoria Insurance, Brokers Limited

31st August 2015

The Chief Executive Officer,

The Jubilee Insurance Company of Kenya Ltd

NAIROBI

Dear Sir,

SUBJECT: APPOINTMENT OF BRIGHT IDEA INSURANCE AGENCY (TENDER NO. JUD/001/2015-2016 FOR JUDICIARY STAFF MEDICAL TENDER

The above subject above refers.

We are writing to complain and bring to your attention that between the 28th of July 2015 and 12th August 2015 we worked and prepared the proposal of the Judicial medical document for Jubilee to participate in the restricted tender for Judiciary tender No. JUD/001/2015-2016. We did this on consultancy basis and did assemble a team who convened in Jubilee Board room on 7th Floor and prepared the Technical document that was eventually forwarded to the Judiciary on the 12th August 2015 up to until you received the letter of award dated 18th August 2015.

Jubilee Insurance Kenya Limited recognized all our efforts and was ready to remunerate us for work done as stipulated in the Insurance Act 487 which directs intermediaries to be paid in form of commission.

However, this was overturned on the 24th August 2015 by an appointment letter which had been signed by the Chief Registrar of the High Court appointing, out of nowhere Bright Idea Insurance Agency to be paid commission. The intention here is to defraud us of our rightful compensation for work done in order to channel the commissions to Bright Idea Insurance Agency for the benefit of someone who did nothing for Jubilee Insurance Kenya Limited to win the tender.

The said letter was forwarded to Jubilee on the 25th August 2015. (My emphasis)

41. Emerging from the evidence is that Victoria, in writing, offered to render consultancy services to Jubilee. On the other hand, although Jubilee did not expressly indicate its acceptance, by its conduct it accepted the offer by receiving those services and ultimately acknowledging them. Two elements of a contract being offer and acceptance has been proved. A third appears problematic.

42. That third essential is consideration. Often, in a service contract the consideration is a money consideration (payment) in exchange for services. However, there is no evidence of a promise by Jubilee to pay fees for the services or of any other form of consideration.

43. But let me assume, arguendo, that by accepting the services of Jubilee, an inference must be drawn that Jubilee must pay for the services as the services were not on charity. Still Victoria runs into another headwind.

44. Victoria bases its claim on commission paid for brokerage services as charged under The Eleventh Schedule of the Insurance Regulations 1986. But is this feasible? At the time the services were offered, Regulation 22 of the Insurance Regulations read:-

“For the purposes of section 73(2) of the Act, the maximum rates of brokerage, commission, payable by an insurer shall be those specified in the Eleventh Schedule in respect of the classes of business specified in that schedule”.

45. In turn Section 73(2) of the Act read:-

“S. 73(2) No insurer shall, in respect of Kenya business, pay to a broker or agent as brokerage, commission, any sum in excess of the amounts prescribed for or in respect of each prescribed class of business placed by that broker or agent with that insurer”.

46. Clearly, the fees under the Eleventh Schedule are rates of brokerage and commission on agency .But as I have held the services offered by Victoria to Jubilee are neither brokerage nor agency and the charges under the Eleventh Schedule are not available to it.

47. The following evidence by the witness of Jubilee may then be partly true;

“If Victoria Brokers had been properly engaged to help in closing the business then they could be entitled to a fee but which is not a brokerage fee. It would be a separate arrangement in which fees would have to be agreed”.

48. Partly true because if, nevertheless, a promise to pay fees for the services had been made by Jubilee but the quantum or manner of fixing the fees was not agreed, Victoria would still be entitled to fees at a reasonable charge. But the onus of proving that reasonable charge was always on Victoria. Victoria should have given such evidence as charges for comparable services or evidence of the actual work done ,expenses incurred or man-hours spent or such other evidence that could assist the Court arrive at a reasonable charge. Here there was none and the Court has nothing to work with. The Claim must therefore fail.

49. The suit is dismissed but I must feel some sympathy for Victoria who carried out some work for Jubilee but have in the end failed to succeed in this cause. For that reason,I order that each party bears its own costs for the suit.

Dated, Signed and Delivered in Court at Nairobi this 24th Day of January 2020.

F. TUIYOTT

JUDGE

PRESENT:

Chacha for Mogeni for Plaintiff

Mureithi for Kipkorir for Defendant

Court Assistant: Nixon