

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 389 OF 2004

JOSEPH KANGUCHU MWANGI.....PLAINTIFF

VERSUS

OLD MUTUAL LIFE ASSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT ON DAMAGES

1. Hon. Justice Gikonyo carried out the involved task of determining the liabilities of parties herein. In his Judgment of 3rd March 2015, the Judge directed that the Defendant to render accounts within 14 days on the policies under the Plaintiff as the Agent for at least the year 2003.

2. On the taking of accounts the parties each called one witness. Kennedy Mitambo Munyao testified on behalf of the Defendant and produced the accounts prepared by one David Ngunya. On the Plaintiffs part Danson N. Mwangi, a Chartered Accountant, gave evidence on the accounts prepared by him.

3. In the accounts prepared by Mr. Ngunya he gives the policies under the Plaintiff from the year 2003 and returns an opinion that a commission of Kshs.2,224,348.87/= would be payable to the Plaintiff. This sum was however increased to Kshs.2,413,880.79/= after some adjustments.

4. On presenting his accounts, Mr. Mwangi made two observations in respect of the accounts produced on behalf of the Defendant:-

(i) That the Defendant only provided the July 2002 commission statement and did not explain how it worked the commission accounts for all business brought by the Plaintiff in the year 2002.

(ii) Some 15 policies had been left out from the accounts.

5. The accountant further explained that the Defendant did not provide the certificate of commission for the year 2002 and in the absence of that certificate he took the commissions earned for the last 3 years and worked out an average increment which came to 21%. He then increased the gross earnings for the year 2001 to reach a commission payable at Kshs.8,336,932/=

6. The witness explained that even if the workings of the Defendant was to be believed, the commissions for the 15 policies that were excluded amounted to Kshs.682,763.66/=.

7. In reaction to the evidence tendered on behalf of the Plaintiff, Mr. Munyao for the Defence noted that the sum of Kshs.4,470,753/= which had been used as the foundation to pro rata the Plaintiff's earnings was not just commissions earned by the Plaintiff but also his salaries. Justifying the exclusion of the 15 policies, the evidence of Munyao is that the policies had lapsed.

8. I have considered the evidence presented in support of the assessment of damages and the short written submissions by Counsel.

9. To be immediately observed is that although the Plaintiff's accountant had advocated for a much higher sum of Kshs.8,336,932/= based on pro rata increment, the actuals worked out in the table presented show a total commission payable as per the schedule to be Kshs.2,907,152.53/=. This was not substantially different from the Defendant's workings which came to Kshs.2,415,880.75/=. The difference it would seem was attributed to the 15 policies that had been omitted from the Defendant's workings. Before I make any further comment on the omissions, the Court holds that it prefers the accounts that is based on the actuals and not speculation. The Court will therefore disregard the prorated opinion of the Plaintiff's witness.

10. The next issue then becomes whether the Defendant was justified in excluding the 15 policies. There should be no difficulty resolving this matter when one recalls the observation of Hon. Justice Gikonyo. In directing the taking of accounts, the Judge notes:-

“The accounts should indicate the status of each policy; maturity, any lapses, surrender or termination of the policies”.

11. The party to render the accounts was the Defendant and the responsibility was on the Defendant to indicate the status of any policy that would have lapsed, had been surrendered or terminated. Whilst the Defendant was at first slow in discharging this onus as it did not include this critical information in its first workings, it later reported on the 15 policies that were excluded. The Defendant produced the following

table:-

<i>REASONS ON WHY THE BELOW POLICIES WERE NEVER INCLUDED IN THE WORKINGS FOR OLD MUTUAL RELATION TO JK MWANGI</i>			
<i>No.</i>	<i>Policies</i>	<i>Names of client</i>	<i>Reasons for Exclusion</i>
1.	6000883	J. Irina	Lapsed-26 th May 2000
2.	6001386	D. Mbai	Cancelled – 7 th February 2000
3.	6001586	P. Wanjohi	Lapsed- 26 th September 2000
4.	6001731	N. Ndegwa	Lapsed- 26 th October 2000
5.	6001720	Ngayu	Lapsed- 26 th October 2000
6.	6001770	A. N. Mutura	Lapsed- 26 th October 2001
7.	6001930	Alex Kazongo	Lapsed- 26 th January 2003
8.	6001989	O. Ajayi	Lapsed- 26 th January 2001
9.	6002005	C. M. Obino	Lapsed- 26 th December 2000
10.	6002085	J. Migwi but not Mohammed as stated by DMC Associates	Lapsed- 26 th March 2001
11.	6002083	A. Mohammed	Lapsed- 26 th June 2002
12.	6002104	A. Awori	Lapsed- 26 th August 2001
13.	600289	D. M. Karanja	No such policy. Wrong Policy ID provided and no match of names in our system.
14.	6003010	P. G. Wanjohi	Lapsed- 26 th October 2001
15.	6002928	A. M. Wachira	Agent not JK Mwangi (Old Mutual Policy allows for Broker for Broker Takeover).

12. As the Plaintiff's witness did not debunk the truthfulness or accuracy of that evidence, I believe it.

13. In the end the Court finds that the Defendant wrongfully held back commission of Kshs.2,415,880.79/= payable to the Plaintiff. That is the proved loss suffered by the Plaintiff and that is the measure of damages that has been established.

14. Before the Court concludes the matter it needs to address one issue. The Defendant took the opportunity presented by the order of taking of accounts on commission to work out the loan amounts due to it from the Plaintiff. No such account had been directed and I make no observations as to the figures returned. In any event, there was no counterclaim by the Defendant. But it has to be remembered that the Defendant holds a charge over Land Reference Number Nairobi/Block 82/326 as security for the Plaintiff's debt. Whilst Judge Gikonyo had found that the Defendant had wrongfully attempted to enforce remedies available to it under the charge because of failure to issue proper statutory notices, the Judge held the Defendant:-

“may, however, issue fresh notices and sell the charged property unless the debt is repaid in full”.

15. The Defendant will still be at liberty to proceed with enforcement of remedies available to it as chargee if, after taking into account the damages due from it to the Plaintiff ,a debt is still owing.

16. As to costs, the Plaintiff has succeeded in proving breach of contract and a claim for damages. The Plaintiff also succeeded in obtaining

a temporary injunction restraining the Defendant from proceeding with the sale of the charged property because of lack of proper notices. The Plaintiff has, by and large, emerged an outright winner in its action and is deserving of costs.

17. Ultimately the Court enters Judgment for Plaintiff for damages of Kshs.2,415,880.79/= with interest thereon at Court rates from the date of filing this suit and costs of the suit.

Dated, Signed and Delivered in Court at Eldoret this 28th Day of April 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT: