



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO 22 OF 2013**

**ANTHONY MASSAWA.....PLAINTIFF**

**VERSUS**

**TIANSHI HEALTH PRODUCTS**

**COMPANY KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**TIENS GROUP INTERNATIONAL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff **ANTHONY MASSAWA** through an amended plaint dated 15<sup>th</sup> April 2017 sued **TIANSHI HEALTH PRODUCT COMPANY KENYA LIMITED** and **TIENS GROUP INTERNATIONAL** praying for judgment against the defendants jointly and severally for:-

- a) US\$ 2,229,000 on account of Car, Yacht, Private plane and Villa Awards.
- b) Kshs.5, 443,072/- on account of Travel Award.
- c) US\$ 10,000 being refundable deposit for Shop No.6.
- d) An order directing the Defendants to render to the Plaintiff Bonus Commission Accounts for the period between January, 2004 to September 2012, and also between October, 2012 to December, 2017 and a further order for the payment of any commissions found to have been withheld from the Plaintiff.
- e) Damages for breach of contract in the nature of lost future earnings.
- f) Costs of this suit and interest on (a), (b), (c), (d) and (e) above.

2. The defendants through an amended statement of defence dated 14<sup>th</sup> July 2017 denied the plaintiff's claim and prayed the suit be dismissed with costs.

3. The plaintiff's claim against the defendants is that at all material times the defendants had engaged the plaintiff as a multi-level marketing independent distributor for its products within Kenya and abroad on agreed terms. The plaintiff claims the defendants breached the terms of the contract by not honouring the awards and failed to pay the plaintiff his entitlements under the awards despite repeated demands and/or reminders. That the breach of plaintiff's distribution contract with the defendants forced the plaintiff to terminate the contract in September 2012. The defendant demanded his withheld payment and also demanded back his US 10,000 which he had paid the 1<sup>st</sup> defendant as shop deposit for shop No.6 but the defendant failed, refused and ignored to settle the plaintiff's claim.

4. The defendants deny the plaintiff's claim averring, that the plaintiff would be entitled to special awards upon attaining a particular level and the defendants would be entitled to make awards as per Business Handbook. The defendants further urged that the plaintiff was actively involved and participated in other direct selling or multi-level marketing companies in breach of terms of engagement with the defendants. That at the time of resignation from the 1<sup>st</sup> Defendant's network the plaintiff was at rank four Diamond Lion Star, which had entitled him to Luxury car, Yatch and trip or the cash equivalent of what had already been fully and finally paid. The defendant's denies the plaintiff's claim.

5. The plaintiff gave evidence as **PW1**, and produced his witness statement (**P-exhibit P-2**) and list of documents as (**Exhibit P-1**) which he adopted as his evidence in chief. The defendants on their part called **DW1**, Wang Yuziang, who adopted his witness statement as his evidence in chief (**Exhibit D1**) and produced list of documents (**Exhibit D2, D3 and D4**). That after close of the parties respective case, the parties filed written submissions. The plaintiff's written submissions are dated 7<sup>th</sup> November 2018 whereas the defendants' are dated 10<sup>th</sup> February 2019.

6. I have very carefully considered the pleadings, parties respective witnesses statements, evidence given before court, and parties rival issues for determination, and submissions, and upon considering the issues arising thereto for consideration I will reduce the issues as follows, which I believe will cover all matters raised in this suit as counsel did not agree on the issues for determination;-

a) **Whether there exists a contractual relationship between the plaintiff and the 2<sup>nd</sup> defendant and if so, who breached the contract and if so what are the consequences?**

b) **Whether the plaintiff validly transferred the distributorship in the 1<sup>st</sup> defendant?**

c) **Whether the plaintiff was entitled to monthly and quarterly statements of his commission accounts showing how the commission paid the plaintiff were arrived at and whether the plaintiff is entitled to an order for production of documents by 1<sup>st</sup> defendant or taking of accounts?**

d) **Whether the Special Awards conferred upon the plaintiff by the Defendant entitled the plaintiff to yearly payments or a one off payment and whether the plaintiff is entitled to recurring benefits and loss of future earning upon the termination of his contract and whether the plaintiff is entitled to special award claimed?**

e) **Whether the plaintiff is entitled to refund of USD 10,000 paid to the 1<sup>st</sup> defendant as a deposit for shop No.6?**

**A) Whether there exists a contractual relationship between the plaintiff and the 2<sup>nd</sup> defendant and if so, who breached the contract and if so what are consequences?**

7. In order to find out whether there exists contractual relationship between the plaintiff and the 2<sup>nd</sup> defendant, the court has to consider the documents presented before it by the parties. From the defendants documents there exists specialty store Agreement dated 12<sup>th</sup> November 2003 between the plaintiff and 1<sup>st</sup> defendant. The parties to the agreement are Tianshi Health products Company (K) Ltd, the 1<sup>st</sup> defendant herein and Anthony Massawa, the plaintiff (**see Exhibit D-3 page 31**). No contract was presented to the court by the plaintiff showing any relationship between the plaintiff and the 2<sup>nd</sup> defendant. **DW1** in his evidence testified that the only relationship between the two defendants was that the 2<sup>nd</sup> defendant was a holding company for the 1<sup>st</sup> defendant. The law is very clear on the legal personalities between a holding company and its subsidiary. The law is that a holding company is a distinct legal entity from its subsidiary and it cannot be sued for any breach of contract by its subsidiary. In the case of **Olx B.V. vs Radio Africa Limited (2017) eKLR**, Hon. Lady Justice Olga Sewe faced with similar situation had the following to say:-

**"The Defendant presented a formidable argument, namely that as a holding company, it is a separate legal entity and ought not to have been sued on account of the actions of its separate subsidiary, The Star. That argument accords well with the law and as such I would only restate, in support thereof, what Ringera, J said in Mosi vs National Bank of Kenya [2001] eKLR."**

8. In view of the executed agreement and the legal relationship between the defendants and the court's finding, I find and hold that there is no cause of action against the 2<sup>nd</sup> defendant as there is no relationship creative of any cause against the 2<sup>nd</sup> defendant.

9. The plaintiff contends that the contract between the plaintiff and the 1<sup>st</sup> defendant created a lifetime distributorship but was also transferable and could also be transmitted to heirs upon death. In the aforesaid contract the parties were bound by the Tians Business Handbook (*see pages 14 to 21 of the defendants Exhibit D-3*). The Handbook lays down the general policies.

**"2.5 Each Distributor, by signing the Distributor Application Form, expressly agrees to abide and be bound by the Rules and Policies of this Business Handbook.**

**26. Any member who fails to observe the Rules and Policies will not plead ignorance to the Rules and Regulations."**

10. The plaintiff contention is that, it is the defendant who breached the contract in several ways whereas the defendant states otherwise. The plaintiff averred defendant failed to deliver to the plaintiff monthly and quarterly statements of his business commission accounts as per clause 23.2 of part 4 of the Handbook and that the defendant failed to pay the plaintiff his entitlements which occurred from the five (5) special awards.

11. **DW1** in his evidence testified that the plaintiff was in breach as he was engaged in two other companies, who were competitors of the defendant, thus **GBG Africa** and **Belo Future Limited** (*see Defendant's Exhibit D-3 pages 1 to 12*). The said companies were Direct selling companies as well as network marketing companies with similar model of the 1<sup>st</sup> defendant being contrary to prohibited activities in the Handbook. At page 1 of the defendant's (**Exhibit D-3**), there is an online excerpt titled **GBG Africa** lavish **GBG** Business opportunity with **DK Mindell**, Paul Anthony (the plaintiff, and Bob, with the photo of the plaintiff, which relation the plaintiff admitted and confirmed his relationship with **GBG** in his letter of resignation of 21<sup>st</sup> September 2012 at page 13 of the plaintiff's list of bundle of documents. In the business model of **Belo Futuro Limited**, the plaintiff name appears, as chairman and **CEO** and which fact the plaintiff did not challenge and further in which the plaintiff's name appear as founder and chairman of the aforesaid company. The prohibited activity as per clause 15

which the plaintiff was engaged in, was engaging in any activity with intention of cheating the company or to deprive other distributors of their rightful benefit and in being actively participating in another Direct selling company.

12. On this plaintiff point, I find there was a fundamental breach of the contract by the plaintiff. The plaintiff having acted in total breach of the contract, he cannot be heard to urge that it is the other party which is in breach of the contract. He who comes to equity must come with clean hands. I there find the blame falls squarely upon the plaintiff.

**B) Whether the plaintiff validly transferred the distributorship in the 1<sup>st</sup> defendant?**

13. Clauses 7 and 8 of the Handbook sets out the regulations governing the transfer of business or sponsorship. Clause 7 deals with will and inheritance which provides the Tiens business can be willed and be inherited and taken over by the heir of the distributor due to old age, disability or death. The terms of inheritance are governed by clause 7.3 and Life distributorship and transfer of sponsorship is governed by clause 8.

14. At the hearing **DW1** expounded on clause 8.1 that the issue of transfer required the attention of the Board of Directors of the 1<sup>st</sup> Defendant which would then be ratified by the 2<sup>nd</sup> defendant. In the instant suit the plaintiff just wrote a letter of 20<sup>th</sup> September 2012 to the 1<sup>st</sup> defendant requesting for a transfer of his distributorship to his daughter, followed on 21<sup>st</sup> September 2012 by plaintiff's letter to 1<sup>st</sup> defendant resigning from Tiens Business. The resignation was accepted by the 1<sup>st</sup> defendant through a letter of 25<sup>th</sup> September 2012. The letter emphasized that accepting his resignation underlined the fact that termination means severance of all privileges and contractual rights available to the plaintiff and that termination will result in the inability to qualify for income and volume bonuses, and severance of all other benefits as sponsored by the company. The defendant confirmed receiving the letter and not raising any objection.

15. In view of the above I find that the plaintiff has not demonstrated that there was a valid transfer of distributorship as the distributorship as per relevant clause could only be on the grounds of old age, disability and death (*see clause 7.1*) and secondly a valid transfer had to undergo through the laid down process before approval and further the plaintiff upon his application he did not give the process chance, as on the following day, he wrote a resignation letter. In view of the above I find due to the plaintiff's acts and failure to give the 1<sup>st</sup> defendant time to fully consider his request, it was not possible for there to be a valid transfer of distributorship by the plaintiff and further all claims falling past 2012 to date would have no leg to stand on.

**C) Whether the plaintiff was entitled to monthly and quarterly statements of his commission accounts showing how the commission paid the plaintiff were arrived at and whether the plaintiff is entitled to an order for production of documents by 1<sup>st</sup> defendant or taking of accounts?**

16. The plaintiff contends the defendants were obligated to supply to the plaintiff monthly statements showing how the plaintiff's Bonus Commission were arrived at. The plaintiff urges the defendant's failure to do so made it impossible for the plaintiff to confirm if the defendants were paying him his true entitlement. Clause 23.3 of the Handbook provides that a dispute on discrepancy in monthly bonus calculation or claim of non-receipt of bonus must be brought to the attention of the company in writing within 30 days from the date of the bonus is issued.

17. The defendant urges the plaintiff's application for production of documents and accounts is a non-starter and must fail. Under order 20 Rule 3 of the Civil Procedure Rules it is provided:-

**"An application for such order as is mentioned in rule 1 and 2 shall be made by chamber summons and be supported by an affidavit when necessary filed on behalf of the plaintiff stating concisely the grounds of his claim to an account; and such application may be made at any time after the time for entering an appearance has expired."**

In view of the above order I find the court's hands are tied as such an application can only be made by chamber summons application but not through submissions. In the case of **Kenya Commercial Bank of Kenya Limited vs Kenya Pipeline Company Ltd (2014) eKLR** Hon. Justice Kamau stated:-

**"Subject to such conditions and limitations as may be prescribed, the court may, at any time, (emphasis court) either on its own motion or on the application of either party (emphasis court) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery and inspection, production, impounding and return of documents or other material objects producible as evidence."**

In view of the foregoing I am of the view that an application for production of documents can only be made by way of an application under **section 22(a) of the Civil Procedure Act** and an application of such nature cannot be made after hearing and closing of the case at the submission stage as the same would be of not good value to the Applicant's case. I find that this prayer if put forward at the wrong time and cannot stand.

**D) Whether the Special Awards conferred upon the plaintiff by the Defendant entitled the plaintiff to yearly payments or a one off payment and whether the plaintiff is entitled to recurring benefits and loss of future earning upon the termination of his contract and whether the plaintiff is entitled to special award claimed?**

18. In the instant suit, there is no denial that the plaintiff was awarded special awards upon achieving particular levels. The plaintiff in support of having achieved the special award also showed the court, during the trial, a "*Trophy*" which was handed over to him by the defendant and in which all 3 Awards conferred upon the plaintiff at Kasarani, are permanently engraved. The defendant in response urged that the plaintiff had not attained the level for the Award of the plane and villa.

19. The plaintiff in seeking the two awards (referred to Exhibit-P1 at page 7) in which the defendant purportedly announced to the whole world as follows:-

".....**The following are the various awards that they have received. They include:-**

1. **Anthony Massawa – Car, Yatch & Plane**
2. **Mary N. Musyoki – Car, Yatch & Plane**
3. **James Waheir – Var, Yatch**
4. ....
5. ....
6. ...."

20. The defendant denied that the plaintiff had qualified for the 5 Awards. The defendant urges the issue of award is two-pronged. First, whether the awards and bonus issued to distributors were a one-off payment and not repeatedly given annually and secondly whether the plaintiff as at the time of termination of his distributorship had qualified for luxury yatch yet award and/or luxury villa award.

21. Under the terms of engagement, the plaintiff would be entitled to a Direct Bonus percentage increased as he advanced in rank while the indirect Bonus percentage varied depending on rank and the ranking of the plaintiff's down line members. The marketing plan however does not state that these bonuses are awardable yearly. The plaintiff at the hearing was unable to point out to the court the clause from the Handbook or in the marketing plan that specifically stated that these bonuses were recurring nor did he ever aver having been paid these bonuses yearly. The plaintiff did not also point out any clause of recurring awarding of the awards.

22. On whether the plaintiff had demonstrated that he had achieved the level 5 Diamond Lion in order to qualify for luxury jet award and villa award, he relied on the defendant's own document at page 7 of the plaintiff's exhibit P-1 in which the defendant listed the plaintiff as amongst the achievers of Car, Yatch and Plane.

23. The 1<sup>st</sup> defendant rebutted that the plaintiff had reached such rank relied on (**Exhibit D-2** at page 27 to 29) showing the plaintiff rose from the Rank of Bronze in 2007 to 4 Star Gold Lion in 2010. The defendant's stated on the contested luxury jet Award as follows:-

**"When a distributor upgrades to Five Star gold lion or above he or she may win the luxury jet award. Award: the qualifier must meet his/her Five-star Gold Lion monthly maintenance for at least six months of a financial year, in which three must be consecutive months to be achieved."**

24. The 1<sup>st</sup> defendant contend that the distributor must upgrade to a Five-star Gold Lion or above to win the jet Award and as the plaintiff had not reached such rank he was not qualified for such award.

25. The plaintiff in his evidence on private jet Award and villa award, states that he was awarded the same before reaching respective ranks. He urged the company awarded him at its own discretion in recognition of his hand work. He further urged he never got the money. The 1<sup>st</sup> defendant in response stated for one to qualify for luxuries jet, one has to attain 5 Star Gold Lion and remain active for the next 6 months and for luxuries villa one has to attain honourably Director and remain active. **DW1** testified the plaintiff did not qualify because at the time he resigned he had reached four star gold Lion and further he did not reach the rank for which he could be given the two awards. In view of clear terms and conditions in the parties contract, I find the parties were bound by their contract and the plaintiff has failed to demonstrate that he had reached the rank for which he could, be awarded with luxury jet award and luxury villa award. The burden of proof that he had reached the rank and was entitled to such awards lay upon the plaintiff to demonstrate he had reached the rank and was denied the awards. He has failed to do so. I find the plaintiff has failed to demonstrate he is entitled to luxurious jet award and luxury villa award.

26. It is contended by the plaintiff that by his letter of 8<sup>th</sup> December 2003 (**Exhibit-D-3 on page 32**) he confirmed that a sum of USD 1000 was deducted by the defendant's from his shop sales and that by his letter on page 34 (**Exhibit D-3**) he confirmed that he had deposited a total of USD 10,000 with the defendants to be able to run shop allocated to him by the defendants; which shop he allegedly surrendered and as such he is thus entitled to a refund of USD 10,800, although the claim is only for USD 10000.

27. The 1<sup>st</sup> defendant position is, that the plaintiff was advanced USD 1000, thus becoming a debtor and 1<sup>st</sup> defendant a creditor which he was to settle at USD 250 periodically. The defendant response through a letter dated 15<sup>th</sup> October 2012 sought evidence in support of the plaintiff's claim for USD 10,000. The plaintiff's claim for USD 10,000 is a special claim which should be specially pleaded and strictly proved. I find these conditions have not been satisfied and in absence of proof in support of the claim for special damage, I find this claim to be without basis.

28. The upshot is that the plaintiff suit is without merit and is dismissed with costs to the defendants.

**Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of March, 2019.**

.....

**J .A. MAKAU**

**JUDGE**