



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO.262 OF 2018

KINETIC INSURANCE AGENCY LIMITED.....PLAINTIFF

VERSUS

AAR INSURANCE K. LIMITED.....DEFENDANT

RULING

1. The Applicant **M/s AAR Insurance K Limited** through an application dated 13th July 2018 brought pursuant to section 80 and 3A of the Civil Procedure Act and order 45 Rule 1 of the Civil Procedure Rules seeks the following orders:-

1. THAT the matter be certified as urgent and heard ex-parte in the first instance.

2. THAT Honourable court do issue a stay of the orders made by the Honourable court on the 4th day of July, 2018 and all other attendant orders pending the hearing and determination of this application.

3. THAT the injunctive orders made on the 4th July, 2018 (prayer 2) to the effect that the Defendant/Applicant be restrained from terminating the Independent Insurance Agency Contract existing between the parties herein be reviewed, varied and/or set aside.

4. THAT the costs of this application be provided for.

2. The application is based on the grounds on the face of the application *inter-alia*:- that service was effected outside the normal working hours and by the time it was handed to legal department on 4/7/2018, it was too late to attend hearing; that failure to attend hearing was not intentional and that it is a misrepresentation that service was at 10.00 a.m leading to issuance of *ex-parte* orders; that the *ex-parte* orders were obtained through deliberate misrepresentation of material facts before the court; that the plaintiff failed to disclose that there exists no agency agreement with Defendant/Applicant and that it is an independent agent who solicits business for insurance companies similar to other agencies and the relationship between the two is strictly introduction of clients on commission basis payable once a client joins the insurance company as a member and pays the relevant premiums; that in offering medical insurance to members the Applicant has no contractual relationship with agents; that the only issue for trial is whether the defendant can be compelled to receive the plaintiff's business when it has clearly and in writing told him at no longer wishes to take any of his clients moving forward; that the orders issued on 4/7/2018 are in effect mandatory orders compelling the defendant to receive the plaintiff's business against its wishes and interest; that the injunctive orders issued are irregular as they relate to the future conduct of third parties not party to this suit; that the orders issued would compromise its business interest and rights to admit members on agreed terms and conditions while the plaintiff has alternatives for his clients hence no prejudice shall be incurred that cannot be compensated by damages; that no appeal has been preferred against the order of 4th July 2018 and that the interest of justice requires the order be reviewed.

3. The Application is supported by affidavit of **NIXON SHIGOLI** dated 13th July 2018 in which he reiterates the grounds set out on the face of the application and to which relevant annexures are attached. The deponent has attached affidavit of service "NS 1" showing the process server deponed the service was allegedly effected on 3/7/2018 at 10.00 a.m.

4. The application is opposed. The Plaintiff/Respondent relies on Replying affidavit dated 20th July 2018 together with further Replying affidavits of the same day and annexures. The Respondent's contention in the Replying affidavits is that; the process server served the application on 3/7/2018 during normal working hours; that no evidence of non-disclosure has been adduced; that the Respondent are the Applicant's insurance agent since 1997 and it is misleading for Applicant to allege that there exists no agency agreement between them; that the Plaintiff/Respondent is the link between clients and the Applicant; that there is established a personal relationship between the Plaintiff/Respondent with its clients that he will serve them for the duration of a policy insurance issued by the Applicant; that Plaintiff/Respondent is not asking the Applicant be compelled to do business with the plaintiff, but is asking the rights of the clients it has

introduced to be safeguarded, and is asking to be given the opportunity to serve the clients for the terms that are running and for a ample notice to disengage with the defendant; that the orders issued do not compel the defendant to take new business from the plaintiff; that interim orders do not prejudice the defendant in any manner as the insurance policy issued to the client are in force and are fully paid for that same; that no justifiable cause has been raised to warrant review of orders sought, given this application is set down for *inter-partes* hearing on 26th September 2016.

5. The Plaintiff/Respondent relies further on an affidavit by David Maina Mwangi and Nancy Wachera Ndiritu, who have been Applicant's client since 1997 and 1996 respectively and who have never over the years dealt directly with the Defendant/Applicant and who have been served on yearly basis and is due to renew the yearly policy on August 2018 and September 2018 respectively; and that the plaintiff has all the years been the parties insurance agent and contact person in respect of the defendant.

6. At the hearing Mr. Mbichire, learned Advocate appeared for the Defendant/Applicant whereas Mr. Nzavi, learned Advocate appeared for the Plaintiff/Respondent.

7. I have very carefully, considered the pleadings herein, counsel rival submissions and the issue for consideration is whether the Applicant has satisfied the conditions to warrant review of the court's order of 4th July 2018 and stay the same as sought by the Applicant/Defendant.

8. A person seeking order for review and from which an appeal has not been preferred, is required under order 45 of Civil Procedure Rules to satisfy the conditions set thereto before an order for review can be granted.

Order 45 (1) (1) (a) and (b) of Civil Procedure Rules 2010 provides:-

"(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

9. In the instant application, the Applicant is seeking review of the court's order of 4th July 2018 on the grounds that the service of the application was effected too late and there was a misrepresentation that service was at 10.00 a.m with intention to mislead court, service was during normal hours when that was not the case; that there was deliberate misrepresentation of material facts; that there was non-disclosure that there exists no agency agreement between the plaintiff and the defendant but that the plaintiff is an independent agent who solicits business for insurance companies similar to other agencies; that Defendant/Applicant specifically in offering medical insurance to members has no contractual relationship with agents but is limited to payment of commission on introduction of new business payable once per year and that the orders issued are in effect mandatory orders compelling the defendant to receive the plaintiff business against its wishes and interests and that the orders issued relate to future conduct of the third parties not party to the suit; that the orders would compromise Applicant's business interests and rights.

10. I have considered the grounds relied upon by the Applicant in seeking review of this court orders; which grounds the plaintiff has not sufficiently challenged. The plaintiff has not challenged service was done outside normal hours and indeed through the two Replying affidavits of the plaintiff's clients it has been confirmed their policies are obtained or renewed yearly. I have considered all the grounds in support of the application for review and I am convinced that there are sufficient reasons for granting review. I am therefrom satisfied that the Applicant has met the criteria set out under order 45 of Civil Procedure Rules to warrant granting orders sought.

11. The upshot is that the application is meritorious. I grant the following orders:-

a) The injunctive orders made on 4th July 2018 under prayer 2 of the notice of motion filed by the plaintiff to the effect that the Defendant/Applicant be restrained from terminating the independent Insurance Agency contract existing between the parties herein be and is HEREBY reviewed and/or set aside.

b) Status quo be maintained as of the time of filing this suit till the hearing and determination of the Plaintiff/Applicant application dated 29th June 2018.

c) Cost be in the cause.

Dated, signed and delivered at Nairobi this 31st day of July, 2018.

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J .A. MAKAU

JUDGE