



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 611 OF 2015

DOMITILAH WANZILA MUVANYA.....PLAINTIFF

VERSUS

JUBILEE INSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT

[1] The Plaintiff herein, **Domitilah Wanzila Muvanya**, filed this suit on **4 December 2015**, seeking special damages of the suit of **Kshs. 12,131,422.86** together with interest and costs, and any other relief that the Court may deem fit to grant. The Plaintiff's cause of action is that, by way of a letter dated **24 April 2015**, she was appointed by the Defendant as an Insurance Agent; and that pursuant to that appointment and the Agency Agreement between the parties, she prepared and concluded a tender with **Kenya Bureau of Standards (KEBS)** worth **Kshs. 128,273,874/=**, and was therefore entitled to a commission of 10% in the sum of **Kshs. 12,131,422.86**; but that the Defendant had failed, refused or ignored to make good the payment despite numerous demands and notice of intention to sue.

[2] The Plaintiff was thereafter amended in terms of the Further Amended Plaintiff filed herein on **6 September 2016**, whereupon, the value of the subject tender was enhanced to **Kshs. 141,003,600/=** and **Kshs. 164,377,602.70**, respectively, for the years **2015-2016** and **2016-2017**, thereby yielding a commission of **Kshs. 30,538,120.27**. The claim was denied by the Defendant in its entirety; and an Amended Defence filed in that regard on **28 September 2017**. The Defendant thereby denied that the Plaintiff is entitled to **Kshs. 30,538,120.27** or any greater or lesser sum or at all. It further denied that the Plaintiff prepared and/or concluded the subject tender or the ensuing contract between it and the **Kenya Bureau of Standards**.

[3] In support of her case, the Plaintiff testified herein on **18 July 2017**. She adopted the Witness Statement filed herein on **24 October 2016**, in which she stated that she was appointed as an agent of the Defendant. The Agency Licence was produced herein as an exhibit at page 52 of the Plaintiff's Bundle of Documents. It was therefore her evidence that, as such agent, she bought and collected the tender documents, and was actively involved in the preparation of the tender for the provision of medical cover for the staff of **Kenya Bureau of Standards, No. KEBS/7090/2014/2015**; which tender was awarded to the Defendant.

[4] It was the testimony of the Plaintiff that she personally delivered the Letter of Offer dated **9 July 2015** to the Business Development Team of the Defendant and continued to service the account on weekly basis by delivering all staff medical cards and other documentation required by **KEBS**. Copies of

the relevant documents were exhibited as part of the Plaintiff's Bundle of Documents at pages 51, 56 to 59. She further testified that all the documents from the Defendant to **KEBS**, copies of which were exhibited at pages 51-55 of the Plaintiff's Bundle of Documents, indicated that she was the intermediary for the Staff Cover. She thus contended that having prepared the technical proposal for the tender, she was entitled to a 10% commission in the sum of **Kshs. 30,538,120.27** for work done; and that the commission due ought to be worked on the basis of the annual premiums of **Kshs. 141,003,600** for **2015-2016**, and **Kshs. 164,377,602.70** for **2016-2017**.

[5] The Plaintiff further testified that on **22 October 2015**, her Advocate wrote a demand letter to the Defendant, demanding the payment of **Kshs. 12,131,422.86** which was due and owing to her at that time, but the Defendant declined and/or refused to make good her claim, hence this suit. The Plaintiff also relied on the notices and other documents exchanged between the parties to support her claim.

[6] On behalf of the Defendant, evidence was called from **Japheth Ogalloh (DW1)**, the Head of Business Development in the Defendant's Medical Department. **DW1** adopted his Witness Statement dated **19 July 2016**, in which he confirmed that the Defendant engaged the Plaintiff as an Agent on **24 April 2015**. The Letter of Appointment was produced at pages 1-2 of the Defendant's List and Bundle of Documents. It was further confirmed by **DW1** that **KEBS** invited bids for the provision of staff medical insurance cover for **2015/2017** vide **Tender No. KEBS/T090/2014/2015**; that the Defendant submitted its bid as per the document at pages 3-27 of the Defendant's Bundle of Documents; and that on **9 July 2015**, the Defendant received a letter from **KEBS** notifying it of the Award of Tender. He added that thereafter, on **28 August 2015**, the Defendant received a letter from **KEBS** appointing **Plan & Place Insurance Brokers** as the intermediary on the medical policy. A copy of the letter is to be found at page 31 of the Defendant's Bundle of Documents.

[7] According to **DW1**, the technical proposal for the said tender was prepared by the Defendant's in-house Business Development and Actuarial Teams, and not the Plaintiff. He added that the Business Development Team, whose mandate includes tender documentation, market sourcing, business prospecting and relationship management with intermediaries, was also charged with the work of interpreting and responding to the technical aspects of the tender. **DW1** testified that such bids are usually submitted with several company documents, such as Certificate of Incorporation, PIN Certificate and Tax Compliance Certificate, which are inaccessible by agents.

[8] It was further the evidence of **DW1** that it was mandatory for every client who appoints an intermediary to provide evidence of the appointment through the Appointment or Change of Agent/Broker Form. He stated that the Defendant received an Appointment or Change of Agent/Broker Form on **10 July 2015**, purporting to have originated from **KEBS**. The document is at pages 28-29 of the Defendant's Bundle of Documents. According to **DW1**, it was on the basis thereof that some of the Defendant's documents reflected the name of the Plaintiff as the intermediary for **KEBS**, adding that thereafter, on the **6 October 2015**, the Defendant received a letter from **KEBS** (at page 32 of the Defendant's Bundle of Documents) revoking the Plaintiff's appointment as its intermediary and denouncing the authenticity of the Proposal for Group Medical Policy Form, by which the Plaintiff had allegedly been appointed the intermediary for **KEBS**. The contention of the Defendant therefore was that it was not obliged to pay any commission to the Plaintiff.

[9] From a careful consideration of the pleadings and the evidence adduced herein, there appears to be no dispute that the Plaintiff was duly appointed as an agent of the Defendant as contended by her. She produced, as exhibits, her Jubilee Insurance identification badge and Provisional Agents' Licence at page 52 and 53 of her Bundle of Documents. In the same vein, the Defendant produced as an exhibit a copy of the Plaintiff's Letter of Appointment (see pages 1 and 2 of the Defendant's Bundle of Documents). That Letter of Appointment, evidently, was for a period of 12 months with effect from **24 April 2015**.

[10] The parties are further in agreement that **Kenya Bureau of Standards (KEBS)** did float a tender for the provision of Staff Medical Insurance Cover for 2015/2017, being **Tender No. KEBS/T090/2014/2015**; and that the Defendant successfully submitted its bid for the Tender. The Invitation to Tender is at page 2 of the Plaintiff's Bundle of Documents. The Letter of Award, for the sum

of **Kshs. 128,273,874/=** dated **9 July 2015** was exhibited by the Defendant at page 30 of its Bundle of Documents. There is credible evidence adduced by both sides to show that a contract was entered into pursuant to the Letter of Award aforementioned; and that the services were duly rendered. There is further evidence that an invoice was consequently raised by the Defendant to **KEBS** for the first year's premium. The invoice was exhibited by the Plaintiff at page 51 of the Plaintiff's Exhibit No. 1. That invoice was for a total premium of **Kshs. 141,638,162.61**. It is also evident, indeed uncontroverted, that the policy was renewed for a further period of 12 months as per the renewal letter dated **24 May 2016** at pages 77-80 of the Plaintiff's Bundle of Documents marked Exhibit No. 2. According to that letter the tender was renewed for the total premium of **Kshs. 193,987,798**.

[11] In the light of the foregoing, the sole issue for consideration is whether as an agent for the Defendant, the Plaintiff was entitled to be paid **Kshs. 30,538,120.27** as commission at 10% of the premiums paid by **KEBS** for the subject tender, granted her contention that pursuant to the Agency Agreement with the Defendant, she prepared and concluded the tender with **KEBS** from the bid stage to the stage of award of tender; and that the Defendant's bid for the tender was procured by the her technical import. Her advocate cited the cases of **Gatobu M'Ibuutu Karatho vs. Christopher Muriithi Kubai [2014] eKLR** and **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd and Another [2002] EA 503** for the proposition that parties are bound by the terms of their contract unless coercion, fraud or undue influence is pleaded and proved; and that a court of law cannot re-write a contract for the parties. The Court was accordingly urged to find that the Defendant is liable to pay the Plaintiff commission for the **KEBS** contract in the sum of **Kshs. 30,358,120.27** as claimed in the Further Amended Plaint.

[12] For the purposes of the Insurance Act, an "**agent**" is defined in **Section 2** thereof as meaning:

"...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."

In accord with the aforestated provision, the Letter of Appointment of the Plaintiff as the Defendant's agent dated **24 April 2015** shows that the Plaintiff was authorized to "**...canvass for the General Insurance Business only...**" for which she would then be paid commissions in line with the Company's commission rate of 10% for both new and renewal business. Ergo, the question to pose is whether the Plaintiff did source for or procure the subject contract.

[13] **DW1** denied that the Plaintiff played any part in the preparation of the tender documents that were submitted to **KEBS** by the Defendant, contending that the documents were prepared by the Defendant's in-house technical team, comprising of its officers in the Business Development and Actuarial Departments, who had the necessary technical competencies to speak to the technical specifications of the Tender, including tender pricing, benefit structure and anticipated loss ratio. **DW1** added that are mandatorily accompanied by several company documents which are not accessible by agents; such as, Certificate of Incorporation, PIN Certificate and Tax Compliance Certificate; and therefore that the Plaintiff could not have prepared and submitted the tender documents as alleged by her, without these vital accompaniments.

[14] There appears to be no evidence in rebuttal of the **DW1**'s evidence in this regard. Indeed, there is no evidence to support the contention by the Plaintiff that she played a key role in the preparation of the documents, or that she had the technical wherewithal to handle the technical aspects of this particular tender. In her evidence, she merely stated that she had three years in insurance agency business; and that she prepared "**...a document which was forwarded and a tender award made...**" In accord with **Sections 107, 108 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya**, it is trite that the burden was that of the Plaintiff 's to prove on a balance of probabilities that, as an agent of the Defendant, she was in fact instrumental in the preparation of the technical aspects of tender documents; which burden the Plaintiff failed to discharge. There is therefore no basis upon which a finding can be premised to the effect that the Plaintiff was instrumental in the preparation of the tender documents on behalf of the Defendant.

[15] The Plaintiff made heavy weather of the fact of her appointment in respect of the **KEBS** contract,

vide the Appointment or Change of Agent/Broker Form (at page 54 of the Plaintiff's Exhibit No. 1, as well as the email communication and the renewal letter in which her name appeared as the Intermediary. However, there is also credible evidence that **KEBS** did communicate with the Defendant vide the letter dated **6 October 2015** (at page 32 of the Defendant's Bundle of Documents) disowning the Plaintiff as their intermediary. At any rate, the definition of an intermediary for purposes of the Insurance Act is instructive. **Section 2** thereof defines an intermediary as:

"...a person who in the course of any business or profession invites other persons to make offers or proposals or to take other steps with a view to entering into contracts of insurance with an insurer, but does not include a person who merely publishes invitations on behalf of or to the order of some other persons."

And there appears to be no evidence that either the Defendant or **KEBS** was specifically invited by the Plaintiff to make offers or make proposals or take steps with a view to entering into the subject contract. Indeed, the Plaintiff expressly conceded in cross-examination that Government tender process makes no provision for the intervention of agents.

[16] Of particular concern, however, is the indication by the Plaintiff that her specific role as an Agent for the Defendant was not so much as to prepare tender documents, but to "**solicit**" or "**procure**" insurance business for the Defendant. In cross-examination she admitted that as an agent, she "**...ensured the tender was awarded to the Defendant...**" Whereas insurance business can be, and is often solicited in the case of individuals and private entities, it is commonplace that public entities are obliged to comply with procurement law and regulations in the procurement of goods and services. Needless to say that **KEBS** is a state corporation and is therefore a public entity for the purposes of the **Public Procurement and Disposal Act, 2005**, which was in force as of **2015** when the subject contract was entered into. It was established as a body corporate pursuant to an Act of Parliament, namely **Standards Act, Chapter 496 of the Laws of Kenya**; and **Section 8** thereof make it clear that the funds of the authority are voted for by Parliament, and therefore entail accountability and prudence in their expenditure. Such prudence and accountability is straight-jacketed by various provisions of the law.

[17] In **Section 2** of the **Public Procurement and Disposal Act, 2005**, for instance, the purpose of the Act was set out as follows:

"The purpose of this Act is to establish procedure for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives--

- [a] to maximize economy and efficiency;**
- [b] to promote competition and ensure that competitors are treated fairly;**
- [c] to promote the integrity and fairness of those procedures;**
- [d] to increase transparency and accountability in those procedures;**
- [e] to increase public confidence in those procedures; and**
- [f] to facilitate the promotion of local industry and economic development."**

Indeed, it is now a constitutional imperative for public entities to ensure prudence in the utilization of public resources. **Articles 10 and 227** of the **Constitution** are pertinent in this regard. **Article 227(1)** stipulates in peremptory terms that:

"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."

[18] In the premises, **KEBS** was obliged to publicly float the tender for the provision of staff medical insurance cover, which it did. The document at page 1-50 of the Plaintiff's Bundle of Documents (and pages 3-27 of the Defendant's Bundle of Documents confirm that the tender was publicly advertised and processed in accordance with the relevant provisions of the **Public Procurement and Disposal Act**, and a Notification of Award written in the Defendant's favour, a copy whereof is at page 30 of the Defendant's Bundle of Documents. In that scheme of things, there was no space for any form of solicitation by an agent, as any such conduct would fly in the face of the constitutional provisions aforementioned. Indeed, it would be deemed collusive and/or corrupt conduct within the meaning of **Sections 38 to 42** of the **Public Procurement and Disposal Act, 2005**; which contained provisions prohibiting inappropriate influence on evaluations, corrupt practices and collusion with a view of manipulating the tender price. Similarly it would be a contravention of **Section 44** of the **Anti-Corruption and Economic Crimes Act, No. 3 of 2003** which prohibits bid-rigging.

[19] Thus, it is manifest that what the Plaintiff is seeking to enforce, even if the Defendant were willing to pay, would be an illegal contract. Authorities abound to underscore the principle that the Court has no business lending the Plaintiff its aid in the enforcement of an otherwise illegal arrangement. Thus, in the case of *Scott vs. Brown, Doering, McNab & CO, (3), [1892] 2 QB 724, Lindley LJ* observed thus in connection with the principle:

“Ex turpi causa non oritur actio. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.”

[20] And in *Pricilla Nyambura vs. Marathon Corporation Corporation Limited and 3 Others [2008] eKLR*, whose facts are quite similar to the facts of this case, a similar conclusion was arrived at by **Kimaru, J.** In that case, it was the contention of the Defendant that, since the Plaintiff had pleaded in her plaint that she influenced the award of tender upon which she filed a claim for the payment of commission, the claim was a grave breach of the applicable laws and therefore contrary to public policy as it was grounded on an illegality and a breach of the **Exchequer and Audit (Public Procurement) Regulations** and the **Anti Corruption and Economic Crimes Act, 2003**. The Court was in agreement and proceeded to strike out the suit. The Learned Judge reasoned thus:

"It was common ground that the plaintiff is seeking to be paid commission by the defendants on account of her role in facilitating the award of a tender to the defendants. According to the plaintiff, if she had not "pushed" the defendants' tender with the right persons in the ministry of defence, the defendants would not have been awarded the tender. It was clear that the plaintiff's role in entire transaction was to facilitate or make smooth the path of the defendants in securing the said tender awarded by the department of defence...It was clear from the foregoing that the plaintiff was not an agent of the defendants in the said tender but was actually a broker on behalf of the persons who were awarding the tender. It was apparent that the plaintiff was intimately involved in the tender process with a view to influencing the award of the said tender to persons who in her view would pay her commission for her "industry" It was clear that the plaintiff was involved in the rigging of the tender which is specifically prohibited by Section 44 of the Anti-Corruption and Economic Crimes Act... What emerges from the said plaint is that the plaintiff is basically seeking the intervention of the court to enforce a contract which advances an illegality."

[21] The foregoing being my view of the matter, I would find and hold that the Plaintiff is not entitled to the commission sought, granted that the contract was entered into following an open and transparent public procurement process that excluded the intervening role of an agent; and that in any event, any solicitation or exertion of influence by the Plaintiff in favour of the Defendant would amount to an

unenforceable illegality. Accordingly, her suit is hereby dismissed, but with an order that each party shall bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER, 2017

OLGA SEWE

JUDGE