



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.52 OF 2014

GEMINIA INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

ALBERT OJONYO

(t/a first class Insurance Agency).....RESPONDENT

[APPEAL FROM ORIGINAL JUDGMENT OF E.A. OBINA SRM IN KISUMU CMCC NO.300 OF 2013]

J U D G M E N T

1. The appeal is premised on the judgment of the lower court delivered on 6.5.2014 in which the appellant was ordered to pay to the respondent a sum of Kshs.1,173.015 together with costs and interest.
2. The background to the above judgment is straight and clear. The appellant entered into a contract in which it insured M/s Spectre International Limited for various risks. The said M/s Spectre International paid Kshs.4,692.060/= as the premium. Prior to paying the premium the insured Spectre International, advised the appellant to deal with the respondent who was its agent.
3. By a letter dated 15.12.12 the appellant wrote to the respondent informing the agency and on the said letter it confirmed the remuneration which was to be paid to it in a form of commission on all the premiums. Upon being paid the premium by the insured, the insurer paid to the respondent a sum of Kshs.28,405/= being commission vide its letter dated 10.1.2013.
4. The respondent then wrote to the appellant demanding a commission of 25% from the premium of Kshs.4,692.060/= already paid by the insured. The appellant failed to pay rendering the respondent to file suit to recover the same.
5. I have perused the pleadings, the proceedings at the trial court as well as the grounds of appeal and the respective oral submissions. The issues herein can be reduced as follows:
 - a) **Whether the respondent was the appellant's agent?**
 - b) **What was the import of the letter dated 15/12/2012?**

- c) **Was the amount of Kshs.28,405 paid by the appellant to the respondent paid in error?**
- d) **Does the principle of estoppel apply herein?**

There is clear evidence that there was a contractual agreement between the appellant and the insured Spectre International. There was offer and acceptance and consideration was paid, namely the requisite premium.

6. The question of whether the respondent was the appellant's agent can be deduced from the letter of 22.10.12 by the insured to appellant which stated in part:

“we therefore advise that based on your quotation we hereby notify your company to liaise with our insurance brokers m/s First Class Insurance Agency of P.O. Box 7018-40100 Kisumu to provide the following cover falling due on 31/10/2012 for a period of 2 years.”

7. That was followed by the letter from the appellant dated 15/12/12 to the respondent in what it stated:

“we have pleasure in confirming your appointment as an Agent in Kenya of Geminia Insurance Company Limited (hereinafter known as the company) with effect from 5/12/12.”

8. The said letter goes ahead to state the percentages of Remuneration under various sub headings. In answering the first issue it appears that the respondent became officially the appellant's agent November 24/00181 pursuant to the letter dated 15/12/12 and the effective date was 5/12/12.

10. But what then was the import of paying the respondent the sum of Kshs.28,405/= by 10.1.2013? The heading of the forwarding letter refers to it as **“commission payable October 2012.”** The said letter goes ahead to attach a breakdown of the payment under the heading. **“First Class Insurance Agency - 24/00181 Spectre International Limited Policies.”**

11. In his evidence DW1 told the court that the sum of Kshs,28,405/= was paid in 'error.' The error was however not explained. I also note that the above amount was paid in January 2012 yet the letter appointing the respondent as agent was to take effect from 5.12.12. What then was the purposes of the payment? The plain reading and interpretation of the payment together with the attached breakdown showed that the same was for the payment of the agency commission. It is infact clearly admitted under column 5 and 6 as commission rates. It is not therefore true that it was a pure error.

12. Even if the agency began on 5.12.12 it's clear that the basis of the contract was the acquisition of Spectre International Limited as a client by the respondent which in my finding prompted the appellant to swallow both the **“potato and the soil.”** The 'soil' herein became unpalatable having realised that the commission was going to be more! Further, the appellant as rightly submitted by the respondent did not demand for the refund of the Kshs.28,405/= and neither did it counterclaim. Writing it off was its prerogative.

13. This is a situation where the doctrine of estoppel fully apply Section 120 of the Evidence Act Cap 80 stipulates that:

“When one person has by his declaration, act or omission intentionally caused or permitted another to believe a thing to be true and to act upon such belief, neither he nor his representatives shall be allowed, in any suit or proceedings between himself and such person or his representative, to deny the truth of that thing.”

14. The appellant can't therefore go back and decline to pay the sum claimed yet it made partial payment. It would infact be different if it had not made the Kshs.28,405/=. By paying the aforesaid sum it had by implication confirmed the agency which it signed with the respondent and which took effect on 5.12.12. In any case its clear that there was no other agreement with the insured other than that of

October 2012 in which the respondent received full premium.

15. In light of the above observation I do not find the appeal meritorious. The argument that there was no contractual relationship between the appellant and the respondent herein is ousted by the appellant's own conduct of paying the sum of Kshs.28,405/= and calling it an error when the respondents demanded to be paid the full commission. The appeal is hereby dismissed with costs.

Dated and delivered this 14th day of May 2015.

H. K. CHEMITEI

J U D G E