**APA Insurance Ltd v Mulei (Civil Appeal E167 of 2023) [2025] KEHC 8919 (KLR) (13 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8919 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CIVIL APPEAL E167 OF 2023**

**JM NANG'EA, J**

**JUNE 13, 2025**

**BETWEEN**

**APA INSURANCE LTD ..... APPELLANT**

**AND**

**BENEDICT MATHEKA MULEI ..... RESPONDENT**

***(Being appeal from Judgement and Decree of the Chief Magistrate's Court at Machakos ( Hon. E. H Keago (CM) in CMCC No. E616 of 2021 delivered on 7th July 2023)***

**JUDGMENT**

1. The Appellant brought this appeal to challenge the decision of the learned trial magistrate in the said Civil Suit No. E616 of 2021 granting judgement in the sum of Ksh. 2,499,939 plus costs and interest to the Respondent being his commission for brokering an insurance deal between the Appellant and Makueni County Assembly Public Service Board on behalf of the former for provision of a medical insurance cover in favour of Honourable Members of the County Assembly and its staff. Before hearing and determination of the appeal, the Appellant filed a Notice of Motion dated 19/6/2024 for the following reliefs:

    1. Leave to adduce additional evidence on appeal.

    2. The costs of the application.

2. That application was dismissed by ruling of this court delivered on 16th December 2024, paving way for hearing and determination of this substantive appeal.

3. The 7 grounds of appeal as per Memorandum of Appeal dated 17th July 2023 may be condensed into two as follows;

    a. That the learned trial magistrate erred in fact and law in granting judgement in favour of the Respondent against the weight of evidence adduced.

b. That the learned trial magistrate erred in law and fact in arriving at his judgement without seeking guidance from established legal principles, for instance, the principle of stare decis.

4. The Appellant therefore seeks reliefs as hereunder;

a. This appeal be allowed.

b. The Judgement/Decree of the Chief Magistrate's Court at Machakos (CMCC No. E616 of 2021) be set aside/quashed and this Honourable Court be pleased to substitute the same with an order for dismissal with costs.(*sic*)

c. The Appellant be granted cost of this Appeal.(*sic*)

5. A brief background to this appeal is that the Respondent instituted suit against the Appellant in the lower court seeking payment of commission for insurance business he procured for the latter from the Makueni County Assembly Public Service Board; general damages for breach of contract as well as the costs of the suit and interest. The Respondent averred in the suit that he had executed a general agency contract with the Appellant in Machakos on the basis of which he was sub-contracted to source for insurance business for the Appellant. Despite successfully procuring medical insurance business for the Appellant from the said County Assembly for 2020/2021 period, the Appellant failed and/ or neglected to pay him agreed commission at 10% of the contract sum amounting to about Ksh. 2,500,000, hence the suit.

6. The Appellant traversed the claim of existence of the agency relationship the Respondent alluded to, arguing that it has always directly tendered for and procured medical insurance business from Makueni County Assembly Service Board from as far back as 2016. The Appellant therefore denies obtaining the insurance business in question through the Respondent. Moreover, the Appellant contends that the County Assembly's medical insurance cover was floated as an Underwriters Only Tender in which intermediaries such as the Respondent were not allowed to participate.

7. The Appellant accordingly denies breaching any contract with the Respondent. For the stated reasons inter alia, the trial court was urged to dismiss the suit with costs.

8. Upon full hearing of the suit, the court entered judgement for the Respondent in the said sum of Ksh. 2,500,000 after finding the Appellant liable for breach of contract. This decision provoked this appeal.

9. Learned Counsel for the Appellant submit that the Respondent did not prove its liability for the claim in the lower court. It is contended that he failed to discharge this statutory duty placed upon him by Sections 107 and 108 of the *Evidence Act* as the Claimant.

10. Counsel further place reliance on the judicial determination in *Muvanya v Jubilee Insurance Company Limited* ( Civil Appeal 225 of 2018) {2022} KECA 146 (KLR) ( 18 February 2022) ( Judgement) where it was observed that Government agencies are bound by the *Public Procurement and Assets Disposal Act* which requires open tendering for government procurement needs, leaving no role for insurance agents/brokers.

11. The Respondent's advocates submit that their client proved his claim in the lower court to the required legal standards. I was referred to case law in *Victoria Insurance Brokers Limited v Jubilee Insurance Company Limited* (2020) eKLR for the definition of an insurance agent/broker. It was explained in this decision that this is a person who brings buyers and sellers together. An insurance agent is further stated to be a person who ordinarily procures insurance for those who request the service. This definition is also endorsed by the learned author of *Law and the Life Insurance Contract*, Muriel L. Crawford 7th Edition cited by Counsel.

12. The Respondent impresses upon the court that there was a trade usage practice between the parties on the facts and circumstances of the case. In *Ken Aluminium Products Limited v High Tech Air Condition & Refrigeration Limited* (2018) eKLR cited by his advocates, trade usage was defined as a course of dealings between parties who are in a business relationship, and the course of dealings is so generally known to all the parties to the dealings or relationship that they must have been presumed to have intended to adopt that course of dealing unless by agreement it is expressly or impliedly excluded. According to the Respondent, there was such trade usage between him and the Appellant in relation to the insurance policy in issue.

13. This being a first appeal I am required to reconsider the evidence adduced, evaluate it and draw my own conclusions bearing in mind that I did not hear and see the witnesses who testified{ (see *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123}. The Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:

> " i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
>
> ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
>
> iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

14. Having perused Counsel Submissions and the record, there is no dispute as to existence of a general insurance agency relationship between the Respondent and the Appellant at the material time. It is also common ground that the Appellant and Makueni County Assembly Public Service Board executed a medical insurance contract during the material period for a sum of Ksh. 25,000,000.

15. In finding in favour of the Respondent, the trial court observed inter alia that the Appellant did not produce a list of underwriters who participated in the alleged open tendering process to show that it was it was an Underwriters only tender. The Appellant was also faulted for failing to avail documents evidencing opening, evaluation and award of the tender in question. The learned trial magistrate therefore reached the conclusion that the Respondent's claim was proven on a balance of probability and entered judgement for him in the sum of Ksh. 2,499,939 being his agreed commission as insurance agent.

16. The issue for determination is whether the trial court correctly found that the Respondent proved his claim on a balance of probability. My brother Kimaru J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLE 526 postulated thus regarding a balance of probability as the legal standard of proof in civil cases:

> " ...In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred..."

17. The Appellant seems to argue that there is no express agreement between the parties on procuring the insurance business in question. In *Mamta Peeush Mahajan (Suing on behalf of the Estate of the late Peeush Premlal Mhajan) v Yashwant Kumari Mahajan (sued personally and as Executrix and Beneficiary of the Estate of Krishan Lal Mahajan)* (2017) eKLR it was held that all agreements entered into by parties thereto need not be in writing or in a special form unless expressly provided by statute. Having admitted in the lower court that the respondent is a registered insurance agent who previously transacted with them on many occasions, not necessarily in writing, the Appellant cannot be heard to disown him herein. I concur with the Respondent that there was a trade usage between the parties that has not been expressly or impliedly varied or repudiated.

18. Moreover, the Appellant has not shown that procurement for the contract was through open tendering as relevant documentary evidence in proof of the fact is not offered. Case law in Muvanya v Jubilee Insurance Limited supra relied upon by the Appellant is distinguishable in the circumstances.

19. In the premises, I find that the Respondent proved his claim in the lower court on a balance of probability. This appeal accordingly lacks in merit and is dismissed with costs to the Respondent.

**J. M. NANG'EA, JUDGE.**

**JUDGEMENT DELIVERED VIRTUALLY THIS 13TH DAY OF JUNE 2025 IN THE PRESENCE OF:**

The Appellant's Advocate, Mr Ochieng.

The Respondent's Advocate, Absent.

The Court Assistant, Jeniffer.

**J. M. NANG'EA, JUDGE.**