



**Munyao v Jubilee Health Insurance Limited (Commercial Case E089 of 2023)
[2024] KEHC 8731 (KLR) (Commercial and Tax) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8731 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E089 OF 2023**

MN MWANGI, J

JULY 11, 2024

BETWEEN

BONFACE SILA MUNYAO APPELLANT

AND

JUBILEE HEALTH INSURANCE LIMITED RESPONDENT

*(Being an Appeal from the judgment and decree of the Chief
Magistrate's Court of Kenya in Nairobi MCCOMMSU No. E1107
of 2021 delivered by Hon. B.M. Cheloti (PM) on 14th April, 2023)*

JUDGMENT

1. The appellant filed a suit against the respondent at the Milimani Chief Magistrate's Court vide a plaint dated 6th August, 2021, seeking that the respondent pays him Kenya Shillings Three Million, Six Hundred and Thirty-Seven Thousand, Two Hundred and Ninety-Eight and Eighty Cents (Kshs3,637,298.80), plus interest at Court rates from 5th February, 2019 until payment in full, and costs of the suit plus interest thereon at Court rates. The appellant's case is that in the year 2016, the parties herein entered into an insurance agency agreement, designating the appellant as the respondent's insurance agent under medical account No.161036.
2. The appellant's role was to solicit, promote, distribute, and facilitate the sale of the respondent's products. He claimed that sometime in October 2019, he successfully facilitated the respondent's bid for a corporate health insurance cover for the National Water Harvesting and Storage Authority (NWHSA), resulting in a tender being awarded to the respondent at a premium of Kshs.36,372,988.00. As such, the appellant claimed entitlement to a 10% commission of the said amount, amounting to Kshs.3,637,298.80. The appellant stated that the respondent in breach of the



agency agreement between the parties herein refused to pay the aforesaid commission, leading the appellant to claim for damages in the stated amount due to breach of contract.

3. In opposition to the appellant's suit, the respondent filed a statement of defence dated 7th October, 2021 where it denied all the averments contained in the appellant's plaint. The respondent stated that the parties entered into an Insurance Agency Agreement on 5th February, 2019. It contended that the appellant was bound by the respondent's 2019 Tender Business Guidelines. That sometime in October 2019, an open tender for provision of medical insurance to NWHSA was advertised and closed on 20th November 2019. The respondent stated that the appellant along with the respondent's other agents expressed interest in partnering with the respondent as intermediaries, and submitted expression of interest forms, which included disclaimers acknowledging the respondent's right to appoint its preferred agent and waiving any claims as the respondent's agent.
4. That on receipt of the expression of interest forms, the respondent evaluated them according to its 2019 Tender Business Guidelines. The respondent indicated that one of its agents, Joram Karanja, was successfully appointed as the respondent's agent for the aforesaid tender, and the unsuccessful candidates were notified. The respondent claimed that the appellant did not demonstrate any role in the preparation, submission, or administration of the tender documents after the tender was awarded. It asserted that the appellant was not entitled to any commission for the tender, and denied breaching the agency agreement between the parties herein.
5. In a judgment delivered on 14th April, 2023, the Trial Court found that the appellant's suit was a non-starter and dismissed it with costs to the respondent. Aggrieved by the aforesaid judgment, the appellant filed a Memorandum of Appeal dated 12th May, 2023 raising the following grounds of appeal –
 - i. That the learned Trial Magistrate erred and misdirected herself by issuing a two (2) page determination which failed to consider the pleadings of the parties, all the material evidence tendered by the appellant and the appellant's written submissions on record and thereby arrived at wrong conclusions of both fact and law;
 - ii. That the learned Trial Magistrate made a fundamental error of fact and law by focusing herself (sic) only on the disclaimer contained in the Tender Expression of Interest Form that was signed by the appellant and ignoring all the other evidence tendered by the appellant on record which vitiated and affected the validity of the said disclaimer, and in consequence, the learned Trial Magistrate arrived at a wrong decision;
 - iii. That the learned Trial Magistrate fell into error and misdirected herself in fact and in law in holding that the appellant duly executed the disclaimer contained in the Tender Expression of Interest Form;
 - iv. That the learned Trial Magistrate was wrong in her understanding that by the disclaimer, the appellant agreed to extinguish his rights in the event that the respondent was awarded the tender and he was not the respondent's preferred agent;
 - v. That the learned Trial Magistrate therefore fell into error and misdirected herself in finding and holding that once the appellant executed the disclaimer, he extinguished his right to claim anything related to the open tender for the provision of medical insurance cover; and
 - vi. That the learned Trial Judge (sic) erred in law and in fact in holding that the plaint was a non-starter upon filing and thereby dismissing the appellant's plaint with costs to the defendant.



6. The appellant's prayer is for the instant appeal to be allowed with costs, the judgment and decree of the Trial Court dated and delivered on 14th April, 2023 to be set aside, and for this Court to enter judgment for the appellant against the respondent as prayed in the plaint dated 6th August, 2021.
7. The instant appeal was canvassed by way of written submissions. The appellant's submissions were filed by the law firm of A. N. Oeri & Company Advocates on 12th October, 2023, whereas the respondent's submissions were filed on 6th December, 2023 by the law firm of Oraro & Company Advocates.
8. Ms. Morara, learned Counsel for the appellant relied on the case of *Chandaria v Nyeri* [1982] KLR 84 cited by the Court in the case of the *County Government of Narok v British Pharmaceuticals Limited (Civil Appeal 20 of 2020)* [2022] KEHC, and submitted that the Trial Court failed to address all issues between the parties that were framed for determination. She contended that a thorough examination would have led to a different conclusion regarding the disclaimer in the Tender Expression of Interest Form and the overall case.
9. She referred to the case of *African Cotton Industries Limited v Rural Development Services Limited* [2021] eKLR, in submitting that the disclaimer in the Tender Expression of Interest Form was not validly executed by the appellant due to certain vitiating factors overlooked by the Trial Magistrate. She contended that the appellant retained his right to sue the respondent despite signing the disclaimer. Counsel cited the case of *Paragon Electronics Limited v Fatma Muses* [2022] eKLR to assert that the disclaimer in the Tender Expression of Interest Form was not part of the Agency Agreement and could not negate the appellant's rights under the agreement.
10. Ms Morara cited the Court of Appeal case of *Standard Chartered Bank Ltd v Intercom Services Ltd* [2004] eKLR, in submitting that the disclaimer as drafted was contrary to the provisions of Sections 2 & 151(1A) of the *Insurance Act* as it failed to appreciate that an agent in relation to an insurer is a person who has already been appointed by the insurance company to solicit for insurance business from a Client. Thus, it was the prerogative of a potential client to choose a particular agent to represent its interests with an underwriter.
11. She indicated that in this case, NWHSA was the appointing party, and the appellant's principal. Ms. Morara cited the provisions of Order 3 Rule 4 of the Civil Procedure Rules, 2010 and the case of *Isaiab Nyabuti Onchonga v Housing Finance Company of Kenya Ltd & another* [2020] eKLR and argued that the Trial Court misapplied the doctrines of waiver, estoppel, and/or acquiescence, which were not available to the respondent as they were not expressly or specifically pleaded.
12. On her part, Ms. Mutua, learned Counsel for the respondent submitted that the appellant was a non-exclusive agent allowed to solicit insurance business for the respondent, but for tenders, the respondent followed its Tender Business Guidelines, as admitted by the appellant. She pointed out that during cross-examination, the appellant acknowledged having signed the disclaimer in the Tender Expression of Interest Form, but he did not allege fraud, coercion, or undue influence, or include the said claims in his pleadings. Counsel urged this Court to bind the appellant to the disclaimer, as he signed it willingly and voluntarily.
13. In submitting that the appellant is not entitled to resile from his past action of holding himself bound to the terms of the disclaimer and is therefore estopped from doing so, Ms. Mutua relied on the Court of Appeal decision in the case of *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR. She asserted that the respondent did not breach the agency agreement, and explained that the NWHSA, a state corporation under Section 30 of the *Water Act*, 2016, advertised a tender for medical insurance as per



the Public Procurement and Disposal Act (PPDA). That the tender was processed according to the Act and the tender document specified in the advertisement.

14. She cited Sections 65 and 66 of the *Public Procurement and Disposal Act* (PPDA), which ban unsolicited communication and corrupt, coercive, obstructive, collusive, or fraudulent practices in procurement, and contended that any solicitation or facilitation by the appellant would violate the said provisions and constitute corrupt practices or unsolicited communication. To buttress the said argument, Counsel relied on the case of *Domitilah Wanzila Muvanya v Jubilee Insurance Company Limited* [2017] eKLR, and urged this Court to dismiss the instant appeal with costs since the appellant's claim for payment of commission is based on illegal conduct.

ANALYSIS AND DETERMINATION

15. Being a 1st appellate Court, I have the duty to analyze and re-evaluate the evidence adduced before the lower Court and reach my own independent conclusion, while bearing in mind that I neither saw nor heard the witnesses testify and make due allowance for the said fact. That was the position taken by the Court in the case of *Peters v Sunday Post Limited* [1985] EA 424, where the Court rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

16. An appellate Court will only interfere with the findings by the Trial Court if the same was founded on wrong principles or the said Court misapprehended the law or evidence. To this end, I am bound by the Court of Appeal finding in the case of *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931, where it was held as follows-

“Accordingly, on when a finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of evidence or the judge is shown demonstratively to have acted on wrong principles in reaching a finding he did, will this court interfere”.

17. I have re-examined the Record of appeal and given due consideration to the written submissions by Counsel for the parties. The issue that arises for determination is whether the appeal herein is merited.
18. It is not disputed that the parties herein entered into an agency agreement dated 5th February, 2019 and 15th April, 2021 which allowed the appellant to solicit, promote, distribute, and facilitate the sale of the respondent's products. The appellant contended that sometime in October 2019, he successfully facilitated the respondent's bid for a corporate health insurance cover for the National Water Harvesting and Storage Authority (NWHSA), resulting in a tender awarded to the respondent at a premium of Kshs.36,372,988/=. The appellant's claim is for 10% commission equivalent to Kshs.3,637,298.80.
19. The respondent's position on the other hand is that in as much as the appellant was allowed to solicit for insurance business for the respondent, when it came to tenders, the respondent followed its Tender Business Guidelines, which required the respondent's agents to express interest in partnering with the respondent as intermediaries, by submitting Tender Expression of Interest Forms.
20. From the evidence of the appellant and the respondent's witness adduced before the Trial Court, it is evident that at the time of signing the agency agreement, the appellant was not provided with the Tender Business Guidelines 2019 to familiarize himself with the same. However, upon perusal of the



appellant's plaint, the appellant confirmed at paragraph 5(c) that his participation in tender insurance business would be in accordance with the guidelines provided by the respondent from time to time. Furthermore, the appellant confirmed that in compliance with the respondent's guidelines in respect to tender insurance business, he duly filled, executed and submitted a Tender Expression of Interest form dated 4th November, 2019, expressing his interest to be the respondent's intermediary in respect to the tender for provision of medical insurance advertised by NWHSA.

21. On perusal of the Tender Expression of Interest Form, I note that it contains a disclaimer duly filled and executed by the appellant which reads as follows -

“I Bonface Sila Munyao hereby expressing interest to be recognized as the agent for the above tender, do appreciate that there could be other agents who may provide more support to enable the Jubilee Insurance Company of Kenya Ltd (JICK) to win the tender. In case JICK is awarded the tender and I do not turn out to be their (JICK) preferred agent, I shall not whatsoever, raise any claim as the agent. I agree that JICK unconditionally reserves the right to determine their agent and their decision as the principal is final. I further commit that at no circumstance shall I act in a manner likely to jeopardize the chances of JICK winning this or future tenders.”

22. In the Trial Court, the appellant confirmed having executed the said disclaimer during cross-examination. He produced correspondence from NWHSA addressed to him stating that NWHSA had appointed him as their preferred agent in respect to the tender in issue and the consequent medical policy offered to them by the respondent, hence the respondent ought to comply and recognize him as the rightful intermediary and/or agent in the said transaction. It is however evident from the disclaimer that the appellant agreed to be bound by the terms of the disclaimer in that the respondent unconditionally reserved the right to determine its agent in the tender for provision of medical insurance, and that its decision as the principal would be final. In essence, that means that the respondent's decision as to who its agent would be in the said transaction could not be influenced by NWHSA in anyway whatsoever.
23. The appellant in his submissions stated that there was undue influence and/or that he was coerced into executing the aforementioned disclaimer. Further, the appellant in paragraph 8(g) of the plaint accused the respondent of committing acts of insurance and/or agency fraud and/or unconscionable conduct but with no specificity. It is my finding that on execution of the Tender Expression of Interest Form and the disclaimer attached thereto, the parties herein became bound by the terms therein. Therefore, the validity of the said disclaimer can only be vitiated if the appellant had pleaded and proved that there was coercion, fraud and/or undue influence that led him to execute the said disclaimer. In this case, none of the vitiating factors have been pleaded and/or proved by the appellant as was noted by the Trial Magistrate, thus the appellant is bound by the terms of the said disclaimer.
24. The respondent asserted that upon evaluation of all the Expression of Interest Forms, it opted to partner with Joram Karanja, one of the its agents. The respondent stated that the unsuccessful candidates, including the appellant, were notified that they were unsuccessful. The respondent produced a copy of an email sent to the appellant on 20th November, 2019 notifying him that the respondent would not partner with him with respect to the NWHSA tender. This email was not disputed by the appellant. It is worth noting that the respondent in paragraph 7(d) of its statement of defence sought leave of the Court to rely on the doctrine of estoppel to the effect that the appellant was barred in law from raising the claim in this suit.
25. The doctrine of equitable estoppel prevents a party from acting inconsistently with a promise the party has made, if that promise or representation had the effect of inducing another party to reasonably rely



on it to that other party's detriment. The Court of Appeal in the case of *Serab Njeri Mwobi v John Kimani Njoroge* (supra) held the following-

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”

26. I agree with the Counsel for the respondent and the Trial Magistrate that having executed the disclaimer attached to the Tender Expression of Interest Form, the appellant extinguished his rights to claim anything related to the open tender for provision of medical insurance to NWHSA, if the respondent was awarded the tender by NWHSA, and if he was not their preferred agent. The appellant was therefore estopped from instituting the suit he filed in the Trial Court and/or claiming commission from the premiums paid by NWHSA.
27. In the premise, it is my finding that the appeal herein is not merited. It is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF JULY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mrs Morara for the appellant

Ms Mutua for the respondent

Mc B. Wokabi – Court Assistant.

