



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 182 OF 2015

ERIC MACHARIA KIGUOYA.....APPELLANT

- V E R S U S -

JUBILEE INSURANCE COMPANY OF KENYA LTD.....RESPONDENT

(Being an appeal from the judgement of Hon. C. Obulutsa (Mr) Senior Principal Magistrate, delivered on 31st March 2015 in Milimani in CMCC No. 3128 of 2013)

JUDGEMENT

1. Eric Macharia Kiguoya, the appellant herein, filed an action before the Chief Magistrate's Court, Milimani Commercial Court in which he sought for judgment in the sum of ksh.4,829,780/= against Jubilee Insurance Company of Kenya Ltd, the respondent herein. The aforesaid claim is said to be commissions for procuring insurance services to **Intercontinental Hotel** from the respondent. The respondent denied the appellant's claim and alleged that the appellant was not involved in procuring the business from Intercontinental Hotel. The respondent also filed a counterclaim against the appellant for a refund of ksh. 5,934,6669/= being commission erroneously paid to the appellant. Hon C. Obulutsa, learned Senior Principal Magistrate heard the suit and in the end, he dismissed both the suit together with the counter-claim. Being dissatisfied, the appellant preferred this appeal while the respondent filed a cross-appeal while opposing the appeal.

2. On appeal, the appellant put forward the following grounds in his memorandum:

1. **THAT the learned magistrate erred in law and fact in making contradictory findings.**
2. **THAT the learned magistrate as a result erred in law and in fact in ignoring the plaintiff's evidence on record.**
3. **THAT the learned magistrate erred in law and fact by considering evidence contrary to Section 35 of the Evidence Act.**
4. **THAT the learned magistrate erred in law in failing to provide a concise statement of the case, points for determination contrary to Order 21 rule 4.**
5. **THAT the learned magistrate erred in law in failing to make findings on issues framed with reasons on each separate issue contrary to Order 21 rule 5.**
6. **THAT the learned magistrate erred in making a finding that the plaintiff did not prove his case.**

3. The respondent on the other hand put forward the following grounds in its cross-appeal:

1. **The learned magistrate erred in law and fact by finding that the cross-appellant had failed to prove its counterclaim of kshs.5,934,969/= while the appellant had acknowledged receipt of the sum from the cross-appellant in his pleadings and testimony.**
2. **The learned magistrate erred in law and fact by failing to find that payment of the counterclaim sum made by the cross-appellant to the appellant was not a fact in issue having been expressly admitted by the appellant.**
3. **Following the finding that the appellant had not proved the claim that he procured business from the Intercontinental hotel in favour of the cross-appellant, the learned magistrate erred in law and in fact by dismissing the cross-appellant's counter-claim.**

4. The learned magistrate erred in law and fact in by making contradictory findings.

4. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written

5. I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions. Though the appellant put forward a total of six grounds of appeal, those grounds may be collapsed to one main ground that is to say that the learned Senior Principal Magistrate erred in dismissing the appellant’s case yet the appellant had tendered credible evidence to prove his claim. The appellant is of the submission that the trial magistrate made contradictory findings and further ignored his evidence on record.

6. The respondent on the other hand is of the submission that the trial magistrate rightly dismissed the appellant’s suit because he did not tender credible evidence to prove his claim. I have on my part re-evaluated the evidence presented. It is apparent from the recorded evidence that the trial magistrate noted that the appellant was in the employment of the respondent as a field agent. The trial magistrate further took into account the letter of appointment issued by the respondent to the appellant in which he was entitled to a commission of 11% on hand and upon renewal of business. The learned Senior Principal Magistrate further noted that the appellant had previously been paid and even went to Dubai on a sponsored trip. It is clear from the judgement of the trial court that the court appreciated the fact that the appellant was an agent and the fact that his performance was recognised with a sponsored trip to Dubai. With respect, I am persuaded by the appellant’s argument that the trial magistrate fell into error when he took two contrasting positions thus wrongly dismissing the appellant’s claim. It is clear from the recorded evidence that the appellant tendered evidence which established his claim to the required standard of proof. The appellant presented evidence showing that he made a power point presentation which enabled **Hotel Intercontinental** to sign a medical insurance scheme for its employees with the respondent. It would appear from the judgment of the trial court that the learned Senior Principal Magistrate relied on a disputed email to dismiss the appellant’s claim yet there was correspondence on the official letterhead of the respondent showing that the appellant was the respondent’s liaison. The question which must be answered is whether or not the appellant proved his case before the trial court? I have carefully examined the written witness statement and the sworn oral evidence of the appellant. The appellant presented a letter from Hotel Intercontinental addressed to the Head of sales of the respondent confirming that the respondent was their contact person. I am satisfied that the appellant proved his claim on a balance of probabilities. Consequently, the order dismissing the appellant’s suit is set aside and is substituted with an order entering judgment in favour of the appellant in the sum of ksh.4,829,780/=. The appellant to have costs of the appeal and that of the suit.

7. Having determined the appeal, let me now turn my attention to the respondent’s cross-appeal. I have already enumerated the grounds of appeal put forward by the respondent in cross

8. The four grounds of appeal may be combined into one main ground of appeal which is to the effect that the learned Senior Principal Magistrate erred by holding that the respondent had failed to establish its claim for ksh.5,934,669/= yet the appellant had admitted receiving the aforesaid sum. The respondent argued that having found that the appellant had not proved his claim that he procured business from Hotel Intercontinental in favour of the respondent, the trial magistrate should not have dismissed the respondent’s counter-claim. The appellant contended the assertion that the aforesaid payments were in error. The appellant pointed out that even during the pendency of the suit before the trial court, he continued to receive payments as a tied agent for the respondent, therefore the learned Senior principal Magistrate did not err in dismissing the counter-claim. A close perusal of the documents relied before the trial court, will show that there were correspondences showing that the appellant was the liaison and contact person between the respondent and Hotel Intercontinental. It is also apparent from the statements produced in evidence by the respondent that the periodic remittances were not standing orders which can be said to have been made in error. They appeared to be periodic and systematic. The respondent failed to prove how it paid in error to the appellant by internal cheques the sum of ksh.3,929,545/= and ksh.2,750,000/= on 7.12.2011. In the end, I find that the respondent failed to prove that it made payments to the appellant in error. The learned Senior Principal Magistrate therefore arrived at the correct decision to dismiss the respondent’s counter-claim.

9. Consequently, I find no merit in the cross-appeal. The same is dismissed with costs being awarded to the respondent.

Dated, Signed and Delivered in open court this 6th day of April, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents