



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 389 OF 2004

JOSEPH KANGUCHU MWANGI.PLAINTIFF

Versus

OLD MUTUAL LIFE ASSURANCE CO. LTD..... DEFENDANT

JUDGMENT

Introduction

[1] This suit was instituted by the Plaintiff through a Complaint dated 16th July 2004. In the complaint, the Plaintiff sought for; a) a permanent injunction against the Defendant from offering for sale, or selling or transferring the Land parcel known as Title No Nairobi/ Block 82/3265 (hereafter the suit property); b) accounts to be taken on the Plaintiff's commission and mortgage; c) damages for breach of contract; d) costs of the suit; and e) interest on (c) and (d) above. The Plaintiff obtained a temporary injunction pending the hearing and determination of the case on the 19th of July 2004. The Defendant entered appearance and filed its Defence on 14th November 2005. Justice Mutava heard the Plaintiff's case. But following the Directions given by Justice Kimondo on 21st February, 2013, I heard the defence witness. I will analyze the entire evidence herein, the submissions of the parties and the law, and make a judgment accordingly.

The Plaintiff's case

[2] The Plaintiff testified on 27th June 2012. He stated that, at the time of testifying, he was doing a small scale business. He was at the material time an employee of the Defendant Insurance Company. He said that he was the first Kenyan sales manager and agent representing the Defendant Company which was then based in South Africa. The appointment letter dated 10th February, 1995 is at page 7 of the Plaintiff's documents filed in court. Paragraph 2 states that his basic salary was Kshs. 70,000/-. Commissions and overrides were not part of this basic salary. Paragraph 2.2 of the said letter of appointment stated that commissions and overrides were to be discussed later. The letter at page 9 of plaintiff's bundle is dated 1st March 1995 and it appoints him as a sales agent representing Old Mutual Life Assurance Company Limited. At paragraph 3 are the common scales for a commission payable to him. Paragraph 7 of the letter (page 10,) deals with termination of the agency contract. That did not have implication on termination of employment.

[3] He was shown page 12 of the plaintiff's bundle, which he stated was a letter dated 5th

December 1997. The letter promoted him from trainee sales manager to a full sales manager. At paragraph No.1 the earnings he was getting were to be reduced to Kshs. 30,000/ per month. He said that he was, then to receive his personal commission on full agency scale. Page 13 of his bundles carried an international magazine owned by Old Mutual Group which is printed in South Africa. At page 17, his photograph is shown as well as a write up stating that he returned the most business with the highest office yearly premium. He was therefore recognized throughout the group. At page 25 of Plaintiffs bundle, is an award given to him by the Association of Kenya Insurers for outstanding achievement for the year 2001. The award is given to the top 10 performers in Kenya in the insurance industry. At page 26 is a letter dated 8th August 2000 showing an increase in management allowance from Kshs.30,000/- to Kshs.50,000/=.

[4] The Plaintiff testified that the certificates of commissions paid to him and the tax deducted from the commissions appears at pages 125- 131. The Certificates were issued to show that tax was paid on the commission. At page 125, the tax deducted was Kshs. 75,000/-. That year, he earned Kshs. 700,000/-. At page 126, he was paid Kshs. 840,000/ and tax deducted was Kshs. 84,000/-. For the year 1997, he earned commission of Kshs. 2,275,409/= for which he paid a tax deduction of Kshs. 227,540/-. In 1998 (page 128) commission paid was Kshs. 2,567,180/- less tax deducted of Kshs. 256,718/-. In 1999 (page 129), the commission fee increased to Kshs. 3,665,003-40, and tax deduction was Kshs.366,500.3/-. For the year 2000, commission paid was Kshs. 3,739,060.47 and Tax deducted was Kshs. 373,906.85. At page 131, his commission for year 2001 was Kshs. 4,470,753.80 less tax deducted which was Kshs. 447,075.38. From all these certificates he stated that the trend of his commissions is that it was going upwards. He got the certificates from Old Mutual which they obtained from the Income Tax Department. The Plaintiff resigned in 2002, but he did not, however, receive his commission or certificate for tax deductions, and so was for the years that followed. For year 2002, the commission should have been more than the previous years.

[5] The Plaintiff gave further evidence, on the letter of resignation at page 133 which is dated 6th August 2002. He addressed the letter to the Chief Executive Officer Stewart L. Henderson. In the letter, he gave a one month notice of resignation. But, in the letter, he did not resign as a commission agent of the defendant. At page 132 is a letter dated 28th August 2001 which was issued to enable him to travel to the U.S.A. The said letter showed that the Plaintiff was an employee of the defendant from August 1994 to that date. The letter stated that his annual income was an average of Kshs. 3,665,500/-. His income was therefore high.

[6] He also testified on the mortgage he had with the defendant company. The latter dated 7th February 2003 and appearing at page 134 is written by the defendant's former advocates Daly & Figgis. The letter demanded mortgage arrears of Kshs. 365,642.00. He also confirmed that his monthly loan repayment was Kshs. 71,349/-. He was servicing the mortgage from the commission. At page 30 of the plaintiff's documents is a commission statement for the month of January 1999. The commission was payable for up to 10 years. The 10 year commission started to run on the 1st year of a particular client until 10 years. At page 33 is an income statement for September 1999. Management fees paid was Kshs. 24,600/= . Actual commission paid was Kshs.249,662.53/= . Under the Gross commissions, there were deductions. These include a mortgage deduction of Kshs. 71,349.00. Had he not earned the commission for September 1999, he could not have repaid the mortgage. After his resignation, he did not receive any payment on commission income statement. The employer did not also apply the commission earned to my mortgage. All he got is the demand letter at page 134- 135 giving him 7 days to pay the mortgage arrears. Further demand letters are at page 136 & 137. At page 137 the letter is dated 22/5/2003. It gives months within which to pay. At page 139 is another letter dated 25th July 2003 giving him another 3 months. This was before expiry of the notice of 22.5.2003. The statement of William Wambugu dated 25th June 2012 at paragraph 4 alludes to a letter of 14.2.2003. He wrote the letter because at the time Old Mutual was already sending people to view his house in Donholm. The actions dented his image as the Chairman of the local residents association. He wrote the letter to keep off the would-be buyers. He also stated that Paragraph D of the statement

of William Wambugu states that the resignation terminated both agreements as sales manager, and as sales agent. He explained that the former was employment while the latter was agency. Paragraph 9 -10 carries the agency contract. Paragraph 7 dealt with termination. It stated that the agency could be terminated by giving 24 hours' notice. But, he never received the 24 hour notice of termination as an agent. Therefore, he concluded that the witness statement of Wambugu is not telling the truth. When he was working, he used to receive income statements. But, after he left, the employer stopped sending the statements until the lawyer requested for them. He referred the Court to a letter dated 11th December, 2003 from Daly & Figgis sending income statement for September 1999 to 2001. The letter is found at page 28 of Plaintiffs bundle. Thereafter, he never got any other document, and to – date he does not know the status of his income.

[7] Despite all the above, they send the letter dated 15.4.2004 stating that there was no commission payable upon termination of employment. The letter is at page 29 and is not a valid ascertainment of matters herein as the contract of employment was not intertwined with that of agency. He referred to the plaint dated 16.7.2004 and told the court that he is praying for a permanent injunction restraining sale of his mortgage property; the taking of accounts; damages for breach of contract' costs of the suit; and interest on the latter 2. At page 140, they demanded sum of Kshs. 3,753,652-95, which in any event, would have been covered by the commission he had earned. He would still remain with some surplus after payment of the mortgage. The Plaintiff stated that it is painful for him to have established the company in Kenya at a time when South African companies were not allowed to operate in Kenya due to apartheid, and then he is treated in the manner the company did. He started with 1 agent and grew the company to 250 sales agents. He lamented that the clarity of his image after all this period is unfortunate and painful. The house sought to be sold is his home to-date.

[8] He continued to testify on cross-examination that he during his employment with Old Mutual, he received accolades for sterling performance. He received training in South Africa and his relationship with the employer was mutually beneficial. The letter of appointment dated 10th February 1995 at Clause 2.2 stated that commissions and overrides would be formalized at a later stage. The commissions came in later. At page 69 is a letter dated 1st March 1995 addressed to him, which, at Paragraph 1 states that he was appointed as an agent. Paragraph 2 stated that allowances would not apply if one was earning management fee. Clause 7 of the same letter refers to termination. This states that termination could be effected by giving 24 hours' notice. However, for gross misconduct, immediate termination could be effected. On termination no commission was payable. Clause 2.2 of letter of 10th February 1995 is what is constituted in the latter of 1st March 1995. It is the clause formalized in the letter of 1st March 1995. Page 12 of plaintiffs bundle carries a letter dated 5th December, 1997. The letter concerned his promotion to manager. After the promotion his commission came down to Kshs. 30,000/- from Kshs. 70,000/=. He was to receive personal commission on the full agents scale. He was to receive an agent's overrides of 13% of the agent's commission.

[9] He was familiar with the terms of the commission and they are as set out in clause 3 of the letter of 1st March 1995 (page 7 Plaintiffs bundle). The remuneration rate was reducing from year to year. The first paragraph indicates commission is paid at 40% of the full premium as it is new business. This is then analyzed at 16% on year two and 4% for the next 7 years. This is paid as long as the business is there. The commission is spread over 10 year period as long as you have not been terminated. It is not necessarily an incentive to bring new business. See page 11 plaintiff's bundle. A claim back occurs when a commission is paid over premiums that were never paid by the client. The agent is usually given notice that the client has not paid and is given time to procure the premium before the claim back is made. Losses accruing during the first three months attracted claim back of all commission payable. Lapses occurring from 4 months onwards would attract claim back based on the date of the lapse. When he was shown page 129 plaintiff's bundle, he said that it bore a certificate of brokerage commissions and that paid in 1999. The gross commission was Kshs. 3,665,003.14. The commission statement is at page 30 of the Plaintiff's bundle. Override commission means own commission inclusive of Agents under

me. These are the 13% referred to in the letter at page 12. The incentive bonus was given when the agent retained 75% of existing clients. At page 32 Plaintiff's bundle set out the lapses. The commission was deducted for premiums not paid. For the year 1999, the commission payable was Kshs. 133,023.72 after deduction of claim backs and override commissions. Shown page 14 defendant's bundle; this is the application for loan of Kshs. 175,800/=. His occupation is stated as sales manager. My annual income is stated as Kshs. 840,000/-. Loan was for a dwelling home, and at page 20 defendant's bundle is the further charge used as security. The house and the income he was earning formed the two securities for the loan. From the application for loan and the mortgage, there is no indication that repayment of the loan was to be made from the commission payable. But he had cleared his debt on the mortgage loan. But he is yet to receive the discharge and title for his property. He was shown his resignation letter and said that the language does not indicate an intention to immediately terminate employment. He left employment to concentrate on sales and not to concentrate on his parliamentary bid as alleged. He said he used to vie for political seats even when was working for Old mutual. He was also travelling and referred to a letter dated 14th February 2003. Paragraph 2 therefore shows that he had verified in good faith to vie for a parliamentary seat.

[10] After his resignation, he did not quit as an agent. After he retired from politics he went to old Mutual to resume his work but was locked out. He was then forced to demand payment of the commissions through his lawyer. The company continued to deduct his mortgage payments from the commission due. But, the company has never given him the breakdown of loan repayments and even the overdue commissions. The penultimate paragraph of the letter dated 14th February indicated that he was starting a new job after which he would start paying his outstanding monthly instalments. He also required time to sell his shares. He never sold his shares. He did not get a job too; he could not make any payments from employment. At pages 36-38 are notices from Daly & Figgis demanding payment. He received the letter. The letters explained the consequence of non-compliance; the property shall be sold in an auction. He never executed any variation of charge. He is aware the property had been advertised in the papers before some valuers came to view the property. The adverts are at page 112-113 of the defendant's bundle. At this time his lawyers had written to state that there was no loan outstanding.

[11] In re-examination, the Plaintiff stated that, the letter dated 14th August 2003 at Page 4 plaintiff's bundle, is addressed to the defendant by his lawyers. The letter states that he was entitled to agent's commission even after resigning as a Senior Manager. The letter demanded that the outstanding commission be paid to me or be credited to the mortgage account. The response in page 6 of the bundle, the defendant stated that matter had been forwarded to their lawyer. He did not know if the proceeds of the commission were credited to the mortgage loan. The purpose of letter at page 7 plaintiff's bundle was to appoint him as trainee Sales manager. Clause 2.2 indicates that the issue of commission was not formalized in the letter. The letter at page 9 of the plaintiff's bundle appointed him as an agent of Old Mutual Life Assurance Company Ltd. The letter contains no single statement that his appointment had any connection with the appointment as sales manager. The commission statements authored by the defendant are at page 30-124. Page 28 of bundle is letter dated 11th December 2003 from Daly & Figgis to his lawyer forwarding the commission statements. The letter from Daly & Figgis dated 13th April 2002 disputes commission payable for the period from 1st September 2003 when employment was terminated on 30th August 2002. The appointment letters at page 7 and 9 do not share the same condition of termination. The letter at page 9 does not state that commission is not payable upon termination of employment except for misconduct. I never left employment for misconduct. The September 1999 income statement appears at page 33 of the plaintiff's bundle and it shows the gross commission was Kshs. 249,662.53. Under declaration, a sum of Kshs. 71,349.00 was deducted. He insisted that he could not pay the mortgage without commission. It was not possible to pay without the income commission. At page 125 of the plaintiff's bundle is a certificate of commission paid and tax deducted. The statement was prepared by the defendant. In the year 1995, I earned a gross commission of Kshs. 700,000/= (see page 131). This is the income statement for year 2001. The gross commission is Kshs. 4,470,753.80/=. At page 137 is a letter from Daly & Figgis dated

22.3.2003 demanding Kshs. 3,635,572.30. This figure was lesser than my commission for year 2001. The letter gave me 3 months to pay from the date of the letter. Page 139 of the plaintiffs bundle is a letter of demand dated 25.7.2003 which was hardly three months. He said he could not tell what he owed or what he is owed by Old Mutual because from the dated he resigned he has never received any communication from Old Mutual on the commission due to him. The loan application form made in September 1997 is at page 14 defendant's bundle. His annual income then was Kshs. 840,000/-. This is the figure reflected in page 126 of the Plaintiff bundle. The document is the certificate of commission paid and tax deducted. The basis of the loan application was the commissions earned. The commission income was the source of the loan repayments. He should therefore be awarded the prayers in the plaint. He produced the bundle of documents dated 12th October 2010 in evidence in this suit.

Plaintiff's Submissions

[12] The Plaintiff filed written submissions. He emphasized that all material times, he was employed by the Defendant and the registered owner of L.R. No. Nairobi/block 82/3265 and the buildings constructed thereon. The Plaintiff made very high sales of insurance covers for the Defendant and the commission he earned was sufficient to qualify the Plaintiff for a house mortgage from the Defendant. On 4th July 1997 the Defendant financed the Plaintiff to purchase the suit premises to the tune of Kshs. 3,400,000/- and executed a legal charge on 4th July 1997 in its favour. It was an implied term that monthly repayment instalments on the mortgage of Kshs. 71,349/- would be repaid from the Plaintiffs commission as the Plaintiffs salary was not sufficient to cover the monthly repayments. On 18th December 1997 and 6th August 1999 two further charges were created on the suit property for Kshs.175,800/- and Kshs.300,000/- respectively in favour of the Defendant. The Plaintiff was earning an average commission of Kshs. 170,000/- per month on personal commissions and indeed realized a gross commission of Kshs. 3,739,068.45 in the year 2000. On 6th August 2002 the Plaintiff resigned from the Defendant's employment as a Senior Sales Manager but not as a Sales Agent which was an independent contract and the Defendant was obliged to continue paying commissions due to the Plaintiff and at the same time deducting mortgage monthly repayments. But, on resignation the Defendant without any colour of right unlawfully terminated the Plaintiff's sales agency commissions resulting to default in mortgage monthly repayments.

[13] The Defendant threatened to exercise its statutory power of sale of the suit property on one hand and on the other hand, it continues to withhold the Plaintiffs commission accruing to Kshs. 4,000,000 per year since 2001. The Defendant failed to comply with Section 65(2) and 74 of the Registered Land Act Cap 300 of the Laws of Kenya and was exercising its statutory power of sale illegally oppressively and has clogged the Plaintiffs equity of redemption. The Plaintiff's case is that the commissions being withheld by the Defendant was sufficient to pay off the loan standing at Kshs. 3,753,652.95 as at 30th June 2000 and leave a substantial surplus for the Plaintiff. Accounts should be taken. The testimony of the Plaintiff supports his case. The appointment letter dated 10th February 1995 reads in part as follows:-

“Following your application and subsequent interviews, I am pleased to offer you the position as Trainee Sales Manger with effect from 1st March 1995 on the following terms and conditions:-

7. Termination

One months notice on either side is to be given or one month's salary in lieu of notice without assigning reason thereto. This is without prejudice to the company's right to terminate the employment summarily for misconduct”.

(See page 7-8 of the Plaintiff's Exhibit No. 1, hereinafter referred to as Plaintiffs bundle)

[14] On 1st March 1995 the Plaintiff was appointed by the Defendant as a commission sales agent and the agents' commission's scale was spelt out on the said appointment letter. The letter read in part as follows:-

“Following your application and subsequent interviews, I am pleased to offer you the position as an AGENT of Old Mutual Life Assurance Company Ltd. With effect from 1st March 1995 on the following terms and conditions:-

7. Termination

Twenty four hours notice on either side is to be given without assigning reasons thereto. This is without prejudice to the company's right to terminate the employment summarily for misconduct.

On termination of the agency agreement no further commission will be paid by Old Mutual”

(See page 9 and 10 of the Plaintiffs bundle)

According to the Plaintiff, the Employment Contract dated 10th February 1995 and Agency Contract dated 1st March 1995 are two separate and distinct contracts for the following reason:-

- a. The Plaintiff applied separately for the two positions and was only successful after undergoing various interviews.
- b. The two contracts have separate termination clauses. For the contract dated 10th February 1995 termination was one month notice to be given by either side or one month's salary in lieu of notice without assigning reason thereto.

For the agency contract dated 1st March 1995 termination was that either side was to give a twenty four hours' notice without assigning reasons thereto. On termination of the agency agreement no further commission was to be paid by the Defendant.

The Plaintiff terminated the contract dated 10th February 1995 through his resignation letter dated 6th August 2002 (see page 133 of the Plaintiffs bundle). But the Agency Contract dated 1st March 1995 has never been terminated by either party to date as provided by clause 7 on termination.

- c. In both contracts the Plaintiff was required to sign, attach a passport size photograph and a photocopy of the Plaintiffs identity card. This demonstrates how separate and distinct the contracts were and none is subject to the other in terms and conditions.
- d. The two contracts have separate and distinct terms and conditions which must be given strict interpretation without deviating from the original intention of the parties.
- e. In both contracts there is no provision that commission was not payable upon termination of employment.

[15] The Plaintiff was exceptionally working hard resulting into his being recognized by the Defendants international magazine known as “Milestones of 1997” when he was voted the insurance industry who wrote and retained the most business with the highest office yearly premium (see page 17 of the Plaintiffs bundle). Prior to the Plaintiffs resignation he was earning gross commission income as follows:-

<u>Year</u>	<u>Gross Commission Income</u>
1995 -	Kshs.700,000/-
1996 -	Kshs.840,000/-
1997 -	Kshs.2,275,409/-
1998 -	Kshs.2,567,180/-
1999 -	Kshs.3,665,003.14
2000 -	Kshs.3,739,068.47
2001 -	Kshs.4,470,753.80

Clearly and following the above trend the commission payable to the Plaintiff in the year 2002 above was enough to pay off the Defendants claim on the mortgage. (See page 125-131 of the Plaintiffs bundle).

The Plaintiffs income statements from the Defendant for the period 1999 to 2002 demonstrate that the mortgage repayment was to be made through the commission paid by the Defendant and at no single time was the Plaintiffs salary sufficient to cater for the loan repayment to the Defendant.

But, the Defendant conveniently refused to give the Plaintiff certificate of commission paid and tax deducted for the years 2002 to date. Similarly, the Defendant has conveniently refused to give the Plaintiff income statements from August 2002 to-date on the pretext that no commission is payable upon termination of employment which allegation has no legal basis as the agency contract dated 1st March 1995 has not been terminated as provided therein (See page 29 of the Plaintiffs bundle). Accounts should be taken and it will be discerned that the commission earned was sufficient to pay off the loan of Kshs.3,635,512.30 which is alleged to be owing and surplus in millions will be due to the Plaintiff.

[16] The statutory notices issued and dated 22nd May 2003 and 25th July 2003 were less than three months as required by Section 65(2) of the Registered Land act Cap 300 of the Laws of Kenya and in any event they were issued in bad faith since it is the Defendant who has been holding the Plaintiffs commission since the year 2002. The Defendant is not entitled to any interest after 2003 since it would amount to unjust enrichment for holding the Plaintiffs commission. The Plaintiff urged the Court to interpret the contract dated 1st March 1995 as a separate and distinct document and termination clause 7 is the relevant clause. He cited case law; a) **Hassan Zubeidi vs Patrick Mwangi Kibanya and another [2014] eKLR** where F. Gikonyo J. held that:-

The court cannot deviate from the intention of the parties to a contract; the sacred duty of the court is to enforce and/or legitimize what parties have agreed between themselves. See the case of GATOBU M'IBUUTU KAROTHO v CHRISTOPHER MURITHI KUBAI [2014] eKLR where the court cited the decision of the court of appeal in NATIONAL BANK OF KENYA LTD v PIPEPLASTIC SAMKOLIT (K) LTD AND ANOTHER (2002) EA 503 where it stated:-

“This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause”.

a) **Michael Njenga vs Rajmuk Investments Limited & 4 Others [2014] eKLR** where Kimondo J. held:-

“Parties are bound by commercial agreements and must keep their part of the bargain. It is not the true province of the courts to rewrite contracts for parties. See Morris & Company vs Kenya Commercial Bank [2003] 2 EA 605 and National Bank of Kenya Limited vs Pipeplastic Samkolit and another [2001] KLR 112. See also Balbir Singh Sadhu and another vs Rose Detho and others Nairobi, High Court case 259 of 2003 [2012] eKLR Isaac Gathungu Wanjohi vs Samson Njoroge and another Nairobi, High court case 614 of 2010 [2013] eKLR, Prime Bank Limited vs Mulji Devraj & Brothers Limited and 2 others Nairobi, High Court case 318 of 2007 (unreported), Consolidated Bank of Kenya Limited vs Securicor Security Services Kenya Limited Nairobi, High Court case 594 of 2003 [2013] eKLR.”

The Defendant’s case

[17] The Defendant called one witness, WILLIAM MUCHANGI WAMBUGU (hereafter DW1). DW1 stated that he works with the Defendant as Human Resource Manager and was familiar with the facts of this case after he had perused the records of his file. He said he does not know the Plaintiff personally but he met him in the course of this case. He was able to discern that the Plaintiff was employed as a trainee sales manager on 10th February 1995. The terms of employment were set out in the letter of appointment. Commissions and overrides were to be formalized later. They were formalized later when he was appointed an agent. As a sales manager he was managing agents but he was appointed an agent to help him also operate as, and manage sales by agents. The Plaintiff was earning commissions and also overrides. “Overrides” was a percentage of the commissions earned by sales agents in your team. The overrides were earned on the basis that the team leader i.e. the sales manager helps the agents in selling the products of the company, gives the clients comfort, introduces clients to the agents etc. The overrides were a kind of incentive. It is only the sales manager or senior sales manager who gets overrides. The letter of appointment tabulated the commission payable. In the first year, you get 40% as much will be put into servicing the clients but it will reduce with time as the customer is more entrenched in the scheme. See clause 3. But if the policy or fund holder fails to pay up the premiums, and the commission had been paid already, there is a claw-back of the commission ordinarily paid in advance. The practice is that the commission is paid in advance. He explained the termination, that on resignation you are not available to service the clients and so you will not earn commission. He recognized the fact that the Plaintiff was a good employee and was paid all his dues. He confirmed that the Plaintiff applied for a loan of Kshs. 3,400,000 through loan application No 000001. The application was approved and letter of offer dated 14th April 1997 was issued. Other than the security offered, in considering the application the company takes into account the ability of the employee to repay the loan. This was done and a charge was registered on the security offered.

[18] The witness told the court that the Plaintiff applied for other loans where he disclosed all his terms of employment. The loans were disbursed to him when he was still in employment. He also serviced his loans when he was in employment. The Defendant accepted the resignation of the Plaintiff vide letter dated 31.8.2002 but they reminded him of his obligation on the mortgage. The Defendants advocate was instructed to demand the sum owing on the mortgage when the Plaintiff defaulted to pay the mortgage. The firm of Daly & Figgis gave the Notice to the Plaintiff. The Plaintiff received the demand Notice and replied acknowledging indebtedness. He also undertook to pay. See page 0000101. But he did not repay the loan as undertaken. The property was then valued and valuation report is at page 000108. A notification for Public Auction was given and is at page 000113. But the auction was stopped by court.

[19] DW1 testified that the Defendant own no commission to the Plaintiff because his appointment letter was clear that on his termination, he will not be entitled to any commission for overrides. The witness said that the Plaintiff was no longer a Sales Manager or agent after

termination. He stated that even in practical terms, it was not possible for the Plaintiff to earn commission unless he applied to be employed as an independent agent. Appointment of independent agents requires a formal application and appointment thereto. He lamented that the Plaintiff has never approached the Bank for some sort of arrangement on this matter.

[20] On cross-examination, DW1 stated that clause 7 of this appointment letter as sales manager provided for termination by giving one month notice or one month's salary in lieu of notice. But the agency contract required issuance of 24 hours' notice to be terminated. He confirmed that they received a resignation letter as sales manager. He also stated that the Plaintiff received management fee of Kshs. 66,000 which was less than mortgage repayment installments which stood at Kshs. 71,349 per month. He referred this court to page 99 of the bundle of documents. On promotion, the Plaintiff allowances dropped from Kshs. 70,000 to Kshs. 30,000 per month. DW1 confirmed that the Plaintiff was appointed as a manager and also as an agent. But the agency agreement was disclosed in the appointment to this post of sales manager. And so these two contracts are tied.

[21] Ordinarily, according to DW1, Sales Managers are allowed to sell as agents in order to earn more income. But he insisted that the Plaintiff may have had other means of repayment of the loan. Repayment was not tied to employment at all. But when shown page 92, he stated that repayment was from the payroll. He insisted that the source of repayment funds is not the issue.

[22] DW1 admitted that the agency agreement does not refer to the employment as Sales Manager or the contract of employment as Sales Manager. He confirmed that the Plaintiff was earning annual commissions of over Ksh. 4,000,000. But he was paid all his dues when he left employment; allowances, commissions and overrides. The witness could not, however, tell how much the Plaintiff was paid. He said the Plaintiff has never written to the Bank about non-payment of his dues. The witness stated that he is not even aware whether the Plaintiff was asking for accounts. According to him Notice for 3 months was issued and is at page 139. The Notice at page 136 was for two months. He admitted finally that the statutory Notices were not valid. He attempted to explain this lapse by stating that they will issue a valid statutory Notice once the injunction herein is lifted by the court. He also clarified one other thing; that according to him, a person continues to receive commissions if he continues to sell products as well as serving the clients. But the Plaintiff did none of these things. He also told the court that Marketing Department entails all agents and all Sales for the Defendant.

The Defendant's submissions

[23] The Defendant filed submissions and listed the following as the issues for determination: -

- a. Was the Agents contract separate from the Management Contract?
- b. In what capacity were there mortgages with Land Title No. Nairobi/Block 82/3265 as security issued to the Plaintiff?
- c. The import of the Plaintiff's resignation from employment
- d. Was there default in payment and did the Defendant issue proper statutory notices?
- e. Is the Defendant entitled to redeem its loan?
- f. Who shall bear the costs of the suit?

The Defendant relied on the Bundle of Documents filed on 14th November 2005, Witness Statement of William Wambugu on 25th June 2012 as well as the testimony by Mr. William Wambugu (DW1). On issue 1: **Was the Agents Contract issued to the Plaintiff separate from the Management Contract?** The Defendant submitted that DW1 gave evidence on the employment of the Plaintiff on 10th February 1995 as a Trainee Sales Manager. As per the terms of clause 2.2 of the Manager's agreement, the Plaintiff was subsequently offered an Agent's contract on 1st March 1995. DW1 testified that this sort of agency was tied to employment of the Plaintiff as a manager; they were allowed to not only carry out their managerial work but also source for clients upon which they would be eligible to earn commission which was different from

persons employed solely as agents of the company. He referred to Clause 2 of the Agency contract dated 1st March 1995 which refers the Plaintiff to his Management Contract informing him that he was not eligible for payment of allowances as he was already earning a management fee. According to the Defendant's submissions, the Plaintiff conceded that it was indeed factual that the agency contract as per clause 7 could be terminated with a 24-hour notice and that upon termination, no further commissions would be payable.

[24] The Defendant also submitted on issue 2: **In what capacity were there mortgages with Land Title No. Nairobi/Block 82/3265 as security issued to the Plaintiff?** The Plaintiff as senior employee of the Defendant was entitled to fringe benefits as provided for in Clause 4 of the Management contract and was entitled to apply for loans. The Plaintiff took advantage of the benefits and applied for a loan of Kshs. 3.4M on 21st November 1996. The Application form was filled by the Plaintiff in his capacity as a sales manager earning an annual income of Kshs. 840,000/= (70,000/- a month). The application was accepted by the Defendant via a Letter of Offer dated 14th April 1997. Subsequently a Charge was registered against the property sought to be purchased by the Plaintiff, to wit, Land Title No Nairobi/ Block 82/3265 as security for the loan. The Charge stipulated on page 2 that interest would be charged at a rate of 25%. However, the Plaintiff was given a rebate on the interest at 15% for the first 1 Million and 22% on the balance. This was however to apply only for as long as the Plaintiff was in the Defendant's employment. The Plaintiff applied for a further loans of Kshs. 175, 800/- and Kshs. 300,000/- and further charges were registered on the suit property. During his employment, the Plaintiff continued to service his loans and in turn obtained loan repayment updates from the Defendant. But he defaulted on resignation.

[25] The Defendant submitted that the import of the Plaintiff's resignation from employment was to terminate his employment as a Sales Manager and Tied Agent. The Defendant's CEO went further and alerted the Plaintiff the significance of his resignation with regard to his outstanding loan. The letter read in part: -

"You are aware that once an employee leaves the services of the company the staff rate automatically reverts to public rate...."

The rate of interest on your mortgage currently at staff rate i.e 15% and 21 % p.a. will be increased to 22% p.a. or such other rate that will be applicable at the time from 1st December 2002."

And since on resignation, all the Plaintiff's dues including commissions were settled by the defendant, he cannot sustain this claim. He accepted the payments. The Plaintiff acknowledged the reminders to pay the loan vide his letter dated 14th February 2003. He conceded to failing to honour his mortgage payments and only raised issue with the inclusion of the September 2002 monthly payments which he asserted had been paid. The Plaintiff further gave his word that he would resume his payments soon thereafter as he had secured employment elsewhere and he would be able to clear the balance. Therefore, in the circumstances, the Defendant submitted that the plaintiff was not entitled to any commissions upon termination. For the Plaintiff to have continued being an agent, it would have necessitated his entering into a contract as an independent agent whose terms slightly differed from a tied agent. For one, an independent agent would have been entitled to allowances which the Plaintiff had not been entitled to as per Clause 2 of his Contract. **See page 9 of the Plaintiff's bundle of documents.** According to the Agents' Financing Arrangement, an agent was entitled to full commission at the rate of 40% at the end of the month of a client's first payment of the accepted policy, thereafter they would earn a commission of 16% for the 2nd year of the policy and 4% for the 3rd -10th year of the subsisting policy. The Defendant's witness testified that these commissions paid throughout the 10 years was an incentive to the agents to continue catering to their clients (i.e. through visits, updates) to ensure that the policy was retained at Old Mutual to full maturity. In line with this, the Plaintiff could not possibly have continued earning a commission whereas he was not working to maintain the

clients. The Defendant argued that the Plaintiff did not bring in new clients to warrant payment of commission.

[26] In relation to the charges on the suit property, the Defendant urged that the Plaintiff cannot seek to amend the terms of the Charge and secure his loan with outstanding commissions. The Defendant further argued that Daly & Figgis Advocates issued various statutory notices culminating into the Notice dated 25th July 2003 (**page 43 of the Defendant's bundle**). The notice was received by the Plaintiff and an affidavit of service was filed by Johnson Kaggia – process server evidencing the same. Section 65 (2) of the Registered Land Act, Cap 300 (applicable then but now repealed) provided:

-A date for repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the charge on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.

The defendant thereafter instructed Gainsight Valuers to conduct a valuation of the property. The same was done (**see page 106-108 defendant's bundle**) however the valuation report is not enclosed. It was however not a point of contention that the valuation was indeed carried out by the Defendant. The defendant produced statements of accounts to show that the Plaintiff's loan is in excess of Kshs. 3,753,652.95 as demanded in the statutory notice with an accrued interest of Kshs. 1,942 until full settlement. See pages 118-132 of the Defendant's bundle.

[27] According to the Defendant, the Plaintiff has not met the required standard to grant a permanent injunction against the sale of the property. They relied on the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125, 132**, where the Court of Appeal defined a *prima facie* case thus:

“A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case...”.

In the said case (Mrao), Kwach JA (as he then was) noted that: -

“the circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury's Laws of England, Vol 32 (4th Edition) para 725 as follows: -

‘The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive’

[28] The Defendant concluded that the Plaintiff has not established a case to warrant the court to issue a permanent injunction preventing the Defendant from realizing its security. And as per the law, costs follow the event and the Plaintiff should pay costs. They cited the case of **Devram Manji Daltani v Danda [1949] 16 EACA 35** where it was held that:

“a successful litigant can only be deprived of his costs where his conduct led to litigation, which might have been averted...”

THE DETERMINATION

Issues

[29] I see the following as the issues for determination in this case:

- a) Were the contract of employment herein and that for agency separate and distinct? Here I will decide also whether termination of one would automatically lead to the termination of the other. And in this context, arguments that a 24 hour notice required under the agency contract was not given will become necessary.
- b) Was the Plaintiff entitled to commissions after resignation? Here issues on provision of statements and taking of the accounts will be discussed.
- c) Whether the statutory Notices issued herein were valid? Under this head, I will decide whether the proposed sale of the suit property should go on or it should be restrained.

[30] One thing is clear; that the employment agreement is distinct from the agency agreement. The Defendant has placed undue reliance on the following statement in the letter of appointment dated 10th February 1995 that:-

“Commissions and Overriders: As discussed – this will be formalized at a later stage”.

By this reference or remark, the letter of appointment dated 10th February 1995 does not constitute the agency agreement. A keen and meticulous consideration of the said statement will reveal that a technical terminology or phraseology was used, that is; *“this will be formalized at a later stage”*. Indeed it was formalized through the agency agreement. Other than being a framework kind of phraseology, I do not think, even with very magnanimous yardstick, it would constitute the agency agreement. The agency agreement was entered into formally after the Plaintiff applied for it and attended interviews thereto. The agency agreement dated 1st of March, 1995 appointed the Plaintiff as an Agent of Old Mutual Life Assurance Company with effect from 1st of March 1995 on the specific terms which were agreed. The terms were spelt out in the agency agreement. Therefore, even if ordinarily a manager would earn commissions and overrides, from the record before court, an agency agreement was necessary for a manager to earn the commissions as an agent. I accordingly find that the two agreements were separate from one another and were governed by the terms in the particular agreement. It is worth of note that what was agreed upon in the agency agreement was totally different from the terms in the appointment letter.

[31] That brings me to the next question: was the agency agreement terminated? Clause 7 of the Agency agreement was very particular on termination; that, except where the Plaintiff's employment was terminated summarily for misconduct, a 24 hours' notice was required to be given by either side, and once the contract is so terminated, no further commission will be paid by Old Mutual. Even the letter dated 5th December 1997 by Old Mutual on Promotion to Sales Manager made a clear distinction between the employment as a sales manager and its allowances, and the agency and commission thereto. The evidence before the court shows that there was no 24 hours' notice that was issued to the Plaintiff terminating the agency contract. I am minded that DW1 told the court that you can be an agent for Old Mutual even if you are not an employee of Old Mutual. This is what he called independent agents. I have already found that the employment contract as a sales manager and as an agent were separate. I also note that the Plaintiff was not dismissed summarily for misconduct, and so the requirement for 24 hours' notice was still an integral part of the agency contract. Now that no notice was issued as per the agency agreement, there is nothing, in practical or legal terms which would relieve the Defendant from adhering with the terms which it signed to observe. I have said before and I will repeat that parties are bound by the terms of their bargain and they will not be allowed to use the court to re-write the terms of their contract. There is no dearth of judicial authorities in this subject and I need not multiply

them. I find that the Defendant by its arguments is inviting the court to re-write what they agreed to in writing. I do not see any ambiguity in clause 7 which requires copious explanations to discern what it entails. Accordingly, the agency contract survived the resignation as long as it was not terminated in accordance with clause 7 thereof. The agency contract did not forbid the Plaintiff to continue being an agent for the Defendant in accordance with the agency contract dated 1st of March 1995. Similarly, as DW1 confirmed, there is nothing which made it impossible for the former employee to be an agent of Old Mutual as provided in their company policies on agents. His explanations that he needed to have applied as an independent agent does not hold any water since they did not terminate the agency agreement of 1st of March 1995. Had they terminated the agency in accordance with the agency contract the arguments they are putting forth now would make sense. I should state here that the agency agreement herein was governed by the Agents Financing Arrangement which applied to agents and was also subject to the Insurance Act. In light of the foregoing, the Defendant was in breach of the agency contract dated 1st March 1995 by failing to terminate it yet paid no commission to the plaintiff.

[32] But the issue which arises is whether the Plaintiff would be entitled to commission on all the insurance policies he acted as an agent for the entire period of 10 years under the Agents Financing Arrangement? First of all, I agree with the Defendant that the Plaintiff did not bring in new clients and did not service the existing insurance policies after his departure. I also agree with the Defendant that any commissions paid in advance would be subject to claw-back on Lapses, Surrenders and Cancellation of policies. Except I also find that, according to the Agents Financing Arrangement, there would be no claw-back or reversal of commissions for the policy year. And of course, there will be no claw-backs on policies which have lived their term or where the insurance policy prohibits surrender of policies or refund of premiums. These things bring me to the point where I should ask, whether the Defendant ought to have provided the Plaintiff an account on the status of policies which he acted as the agent? I have found that the Plaintiff was entitled to a notice of termination of the agency contract but which was never given by the Defendant. The Plaintiff was, therefore, entitled to at least a final statement of his account for one year 2003 which indicated the status of the insurance policies in which he was an agent and the commission earned or payable. The accounts supplied are up to the time of his resignation. In the absence of termination of the agency agreement, he is entitled to damages. He gave them a one month notice, and if they tied the agency to the employment they ought to have settled the accounts in a formal manner and all these issues would not have arisen. The court is, therefore, convinced that the Plaintiff is entitled to and I order the Defendant to render accounts within 14 days on the policies under the Plaintiff as the agent for at least the year 2003. The accounts should also be filed in court as from the accounts; the court will be able to discern whether the Plaintiff is entitled to any commission. The accounts should indicate the status of each policy; maturity; any lapses, surrender or termination of the policies. I have also made a finding that the Defendant breached the agency agreement when it left it intact, thereby raising expectation for a commission. The Plaintiff is, therefore, entitled to damages. But I will assess quantum on damages after the accounts have been filed and parties have submitted on the accounts as well as the quantum on damages. I will assign this case a date for purposes of confirming compliance with the above directions.

[33] But one major issue is still outstanding; sale of the suit property. Meanwhile, there are two matters which are of preliminary significance here. The first one is on the debt owing, and the second on the mode of payment. There are not serious contestations from the Plaintiff on the debt owed. He has merely stated that he was not sure about the sum owed. But everything points at one conclusion; that the sum owing is as shown in the notices herein. The matter which seems to elicit heated arguments is whether the Defendant was obliged under the charges herein to recoup the commission due to the Plaintiff towards repayment of the loan. The charges herein provided for repayment of a sum specified in the charge in consecutive monthly instalments; the sum represents the principal sum with interest thereon in accordance with the charge. Although the loan application form mentioned the terms of employment of the Plaintiff, there is no term that was incorporated in the charge which specified the source of the repayment funds. And I agree with the Defendant in that respect, although in situations such as the one we are faced with, if

there were funds due to the borrower from the chargee, ordinarily parties would find ways of utilizing such funds towards repayment of the loan. And of course, it should be on mutual understanding of the parties. The two small issues are now out of the way. I will tackle the huge issue on whether the statutory notices herein were valid.

[34] This is the core of this matter. DW1 admitted that the statutory notices issued were not in compliance with the law. But he stated that, they are ready to issue proper notices if the injunction herein is lifted. These notices were not for the period provided in Section 65 (2) of the Registered Land Act, Cap 300 (now repealed). They were issued in a succession which did not comply with the law. On that admission, prima facie, an injunction should issue. But an injunction which is issued on the basis that the statutory notices were not issued properly lasts for as long as the valid notices are not issued. If the chargee issues proper notices in law, there is nothing which prevents them from selling the suit property. Accordingly, I restrain the sale of the suit properties on the notices issued herein. They may, however, issue fresh notices and sell the charged property unless the debt is repaid in full. Determination as to who pays costs of the suit shall await the outcome on the assessment of damages. It is so ordered.

Dated, signed and delivered in court at Nairobi this 3rd day of March 2015

F. GIKONYO

JUDGE