



**Muvanya v Jubilee Insurance Company Limited (Civil Appeal
225 of 2018) [2022] KECA 146 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 146 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 225 OF 2018
DK MUSINGA, HM OKWENGU & MSA MAKHANDIA, JJA
FEBRUARY 18, 2022**

BETWEEN

DOMITILLAH WANZILA MUVANYA APPELLANT

AND

JUBILEE INSURANCE COMPANY LIMITED RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at
Nairobi (Sewe, J.) dated 22nd December, 2017 in H.C.C.C. No. 611 of 2015)*

JUDGMENT

1. This is an appeal from the judgment of the High Court dated 22nd December 2017 which dismissed the appellant's claim for payment of agency commission in the sum of Kshs.30,538,120.27.
2. The brief background to this appeal is that the appellant alleged that she was an appointed insurance agent of the respondent and was responsible for bringing business to the respondent from the Kenya Bureau of Standards (KEBS) through Tender No. KEBS/T090/2014/2015 which was awarded to the respondent on 9th July 2015. The tender was for the provision of medical insurance cover to the employees of KEBS.
3. As per the plaint dated 4th December 2015 and which was subsequently amended on 6th September 2016, the appellant alleged that she was entitled to a 10% commission of the total value of the tender in question which the respondent had declined and/or refused to make good thereof despite numerous demands. The initial tender amount was for Kshs.128,273,874.00 which would translate to a commission of Kshs.12,131,422.86. The subject tender was however reviewed upwards to Kshs.141,003,600.00 for the year 2015-2016 and Kshs.164,377,602.70 for the year 2016-2017, yielding a total commission of Kshs.30,538,120.27. This is the amount the appellant was claiming in the form of special damages from the respondent through her Amended Plaint.



4. At the trial, the appellant testified as the only witness, while the respondent called Japheth Ogallo, its Head of Business Development Division as its only witness. The appellant reiterated that she was involved in the respondent's acquisition of business from KEBS at every stage of the tender process and was therefore entitled to the 10% commission. On its part, the respondent argued that its Business Development Team was the one responsible for the acquisition of the tender in question and that the appellant was not in any way involved in the particular tender, nor was she the appointed intermediary by KEBS. She was therefore not entitled to the payment of any commission.
5. The trial court in its judgment dated 22nd December 2017 made a finding that the appellant had not demonstrated the role that she played in the respondent's acquisition of business from KEBS, that pursuant to section 107 of the *Evidence Act*, the burden of proof lay with the appellant, which she had failed to discharge. The trial court also held that the tender in question which was floated by KEBS; a Government Agency, did not contemplate any role of an insurance agent since it was an open tender which was to be awarded through a process of competitive bidding. It was also the finding of the trial court that since the contract between the appellant and the respondent which the appellant sought to enforce involved the canvassing of business from a public entity, then the contract was illegal and unenforceable. For these reasons, the trial judge made a finding that the appellant was not entitled to be paid any commission by the respondent and accordingly dismissed the suit with costs.
6. The appellant, being dissatisfied with the decision of the trial court, has appealed to this Court. The appellant's Memorandum of Appeal which is dated 6th July 2018 contains 8 grounds of appeal. However, the 8 grounds can be consolidated into just 3 grounds of appeal. The appellant faults the trial judge for: failing to analyse the evidence presented before her and misapprehending and misapplying the law on the facts presented before her and thereby arriving at an erroneous and inconsistent decision; failing to appreciate the Insurance Law on agency and misguiding herself by failing to find that the appellant was an agent of the respondent and was therefore entitled to the prayers sought; and for introducing extraneous matters that were neither pleaded nor proved.
7. At the hearing of this appeal, the appellant was represented by Miss Makori, learned counsel, while the respondent was represented by Mr. Donald Kipkorir, learned counsel. In her brief highlight of the appellant's written submissions dated 29th January 2019, Miss Makori urged us to find that the trial judge had erred by failing to make a finding that the appellant was an agent of the respondent as far as Tender No. KEBS/T090/2014/2015 was concerned. She sought to draw a distinction between an insurance agent and a broker and their respective roles by relying on the case of *Pan African Insurance Company Ltd & 2 Others v. Clarkson & Southern Ltd* [1993] eKLR, where it was held that a broker was an agent of the assured. Learned counsel asked us to find that the appellant was indeed an agent of the respondent and therefore entitled to her commission. When asked about the legality of the contract between the appellant and the respondent as far as the tender in question was concerned for use of the words 'canvass for business', learned counsel stated that the term 'canvass' merely referred to 'looking for business' and that in any case, the appellant was not claiming the commission from KEBS but from the respondent for whom she was an agent. According to learned counsel, the contract between the appellant and the respondent was perfectly legal and the provisions of the Public Procurement and Disposal Act were inapplicable in the circumstances of this case.
8. Highlighting his written submissions dated 16th April 2019, Mr. Kipkorir asked us to find that the appellant had not met the threshold for overturning the decision of the trial court as set out in the case of *Royal Court Hotel Limited v Minister for Labour & another* [2018] eKLR. He further submitted that before the enactment of the *Public Procurement & Disposal Act* in the year 2005, agents had a role to play in the tender process but after enactment of that Act, agents had no role to play in procurement involving public entities.



9. The jurisdiction of this Court as a first appellate court was aptly laid down in *Selle & Another v. Associated Motor Boat Co. Ltd.* [1968] EA 123 at p 126:

“An appeal to this Court from the trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hamid Saif v. Ali Mohamed Sholan* [1955] 22EACA 270).”

10. We have considered the record, submissions by counsel and the law. In our view, the following two issues commend themselves to us for determination in this appeal: -

- i. Whether the appellant was an agent of the respondent with respect to Tender No. KEBS/T090/2014/2015 floated by KEBS; and
- ii. Whether the appellant is entitled to the payment of the commission as sought.

11. It is not in dispute that the appellant was a duly appointed insurance agent of the respondent. Several documents which included the appellant’s letter of appointment as an agent dated 24th April 2015 as well as her identification badge both issued by the respondent were exhibited before the trial Court. In fact, the respondent at paragraph 2 of its Defence Under Protest dated 3rd February 2016 and the Amended Defense Under Protest dated 28th September 2016 admitted the contents of paragraph 4 of the appellant’s Complaint dated 4th December 2015, the Amended Complaint dated 25th January 2016 and the Further Amended Complaint dated 6th September 2016 wherein the appellant had claimed to be a duly appointed agent of the respondent, effectively clearing any doubts on the relationship between the two parties. We need not belabour this point.

12. The issue that we must determine is whether as an agent of the respondent, the appellant was in any way involved in acquiring business from KEBS on behalf of the respondent through tender No. KEBS/T090/2014/2015 and whether she is entitled to the commission sought.

13. It is the appellant’s argument that she personally bought and collected the tender documents from KEBS and delivered them to the respondent. This was not her only involvement with this tender. She argues that she was actively involved in the preparation of the tender documents and that her efforts culminated in the issuance of the tender to the respondent vide a letter dated 9th July 2015.

14. The respondent through its Head of Business Development Division known as Joseph Ogallo denied the involvement of the appellant in the whole tendering process. He testified that the respondent has a Business Development Team whose mandate includes tender documentation, market sourcing, business prospecting and relationship management with intermediaries. Further, that the respondent also has on board an Actuarial team which advises on tender pricing, benefit structure with the attendant cost, anticipated loss ratio of pricing and also carries out data analysis. Therefore, respondent’s argument is that its Business Development Team worked on the technical aspects of the tender and the appellant as an insurance agent had no role to play in the entire process.

15. The respondent also marveled how the appellant could have gotten access of its documents such as the Certificate of Incorporation, PIN Certificate and Tax Compliance Certificate, which are key



supporting documents for the tender and which documents are not accessible to agents. According to the respondent, this is one more pointer to the fact that the appellant could not have been involved in the tender process as she alleges.

16. The trial court at paragraph 14 of the impugned judgement stated, inter alia:

“... Indeed, there is no evidence to support the contention by the plaintiff that she played a key role in the preparation of the documents, or that she had the technical wherewithal to handle the technical aspects of this particular tender.”

17. We agree with the findings on the trial court on this issue. The onus was on the appellant to prove her involvement and/or the specific role that she played as an agent on behalf of the respondent towards the acquisition of the said business from KEBS. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. The is the purpose of section 107(1) of the *Evidence Act* (Chapter 80) Laws of Kenya which provides:

“ 107.

(1) (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

18. It was not sufficient for the appellant to merely state that she prepared and concluded the tender with KEBS from bid stage to the stage of awarding the tender to the respondent, or that her technical impact was instrumental to the awarding of the tender to the respondent. The appellant had an obligation to demonstrate the crucial and specific role she played in the tendering process. For instance, it is not clear to us what the appellant means when she says that she prepared the tender documents. Was she involved in filling the information in the physical tender documents; advising on the tender pricing or what actual role did she play?

19. In the absence of evidence to the contrary, we are inclined to agree with the respondent that its Business Development Team together with its Actuarial team worked on the tender documents and was instrumental in the award of the same. In any case, and with all due respect to the appellant, the technical aspects of a tender such as the one in question requires great expertise, which the appellant did not demonstrate to possess, save to state that she had three years’ experience as an insurance agent.

20. Having arrived at the finding that the appellant did not play any critical role as far as the respondent’s acquisition of business from KEBS was concerned, what then should we make of the various letters and emails authored by employees and/or agents of the respondent which appeared to acknowledge the appellant as the intermediary for this business? What about the allegation that the appellant continued to service the KEBS Account on weekly basis by delivering all staff medical cards and other documentation required at KEBS? The respondent through its witness testified that an intermediary is appointed by the client. Further, that it was mandatory for every client (such as KEBS) who appointed an intermediary to provide evidence of the same vide the Appointment or Change of Agent/ Broker Form or through the Proposal Form. There was evidence that the respondent received from the appellant an Appointment or Change of Agent/Broker Form dated 10th July 2015 purportedly appointing the appellant as the intermediary and which document was said to have originated from KEBS. A copy of that letter also appears in the appellant’s list of documents filed in the trial court.

21. The respondent argued that any reference in any of its letters or emails to the appellant as being the intermediary for this business was due to the representation created by the appellant through the aforesaid document. The same situation obtains for the appellant’s servicing of the KEBS Account.



However, the position and or the role of the appellant was clarified by KEBS through its several letters to the respondent. Firstly, vide a letter dated 9th July 2015, KEBS informed the respondent that it had not appointed any insurance broker for the business in question. Secondly, on 28th August 2015, KEBS wrote to the respondent confirming the appointment of Plan and Place Insurance Brokers as the intermediary for the business in question. Lastly, on 6th October 2015, KEBS wrote to the respondent revoking the appellant's appointment as the intermediary and denounced the authenticity and authority of the completed Proposal for the Group Medical Policy Form through which the appellant had allegedly been appointed as the intermediary for this business.

22. We have looked at the proceedings before the trial court and note that the appellant did not appear to be challenging the testimony by the witness of the respondent that an intermediary is appointed by the client. We therefore take this to be the correct position as far as the appointment of an intermediary is concerned. KEBS denied having appointed the appellant as its intermediary and went ahead to disown the Proposal Form for the Group Medical Policy which it is alleged to have completed and which had appointed the appellant as the intermediary. The appellant also did not appear to be challenging the three letters from KEBS disowning her as the intermediary. The argument by the appellant in her demand letter to the respondent and in her pleadings was that she was an agent of the respondent.
23. Having noted that the appellant did not challenge arguments by the respondent that an intermediary is appointed by the client, we can only arrive at the conclusion that the appellant was not the intermediary for the business in question. We agree with the respondent that any of its reference to the appellant as being the intermediary for the medical policy was wholly attributable to the Appointment or Change of Agent/Broker Form dated 10th July 2015 which originated from the appellant and which was denounced by KEBS through its letters dated 9th July 2015, 28th August 2015 and 6th October 2015 respectively.
24. The above notwithstanding, it is doubtful, (which doubt was also expressed by the trial court) that the appellant could have played the role of an insurance agent with regard to the tender in question. KEBS, the procuring entity for the tender in question, is a Government Agency and was bound by the provisions of the Public Procurement and Asset Disposal Act, 2005 in its procurement processes. The tender in question was an open one requiring, inter alia, invitation to tender pursuant to section 74 of the Public Procurement and Asset Disposal Act and advertisement of the tender pursuant to the provisions of the section 9 of the same act. In the circumstances, we do agree with the trial judge that the Public Procurement and Disposal Act does not contemplate any role for an insurance agent such as the appellant.
25. According to the appellant's Letter of Appointment, she was authorized to 'canvass' for general business on behalf of the respondent. While being cross-examined by counsel for the respondent, the appellant stated in part that "she ensured the tender was awarded to the respondent."
26. The *Collins English Dictionary, 4th edition* defines the word 'canvassing' as the solicitation of opinions, votes, sales, orders etc. Therefore, the term canvassing is synonymous to solicitation. Whereas canvassing for business from private individuals and entities would ordinarily be legal, soliciting for business from public entities such as KEBS would outrightly be illegal. We agree with the finding of the trial judge that what the appellant is seeking to enforce is an illegal contract as far as the tender in question is concerned. In *Heptulla v. Noormohamed* [1984] eKLR, this Court cited with approval the



findings of Lord Morris of Borth-y-Gest in the case of *Mistry Amor Singh v. Kulubya* [1963] EA 408 on the legal maxim *Ex Turpi causa non oritur actio* thus:

“...No court ought to enforce an illegal contract whether the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality...”

27. Similarly, in *Patel v. Singh* [1987] eKLR, this Court explained the effect of an illegality of a contract as follows:

- a) If at the time of making the contract there is an intent to perform it in an unlawful way, the contract although it remains alive, is unenforceable at the suit of the party having that intent and where the intent is common, it is not enforceable at all.
- b) The illegality may prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act. He may not recover even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal.
- c) An illegality may also have the effect of making the contract void ab initio and that arises if the making of the contract is expressly or implicitly prohibited by statute or otherwise contrary to public policy.”

28. The learned authors of *Chitty on Contracts, Twenty-Eighth Edition Volume 1 General Principles*, expressed the following opinion on illegal contracts at page 839 thereof:

“Where a contract is illegal as formed, or it is intended that it should be performed in a legally prohibited manner, the courts will not enforce the contract, or provide any other remedies arising out of the contract. The benefit of the public and not the advantage of the defendant, being the principle upon which a contract may be impeached on account of such illegality, the objection may be taken by either of the parties to the contract. “The principle of public policy,” said Lord Mansfield, “is this *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff’s own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that court goes; not for the sake of the defendant but because they will not lend their aid to such a plaintiff...”

29. It is our view that the contract which the appellant seeks to enforce against the respondent was an illegal contract in so far as the canvassing of business from KEBS was concerned and therefore unenforceable. For this reason, we are in full agreement with the trial judge that the tender issued to the respondent was acquired in a transparent manner after a competitive bidding process. We reiterate that there was no evidence that the appellant was involved in any way in the tendering process, either as an insurance agent, advisor and or intermediary in any case, we have already made a finding that the Public Procurement and Disposal Act does not contemplate any role for insurance agents in the tendering process involving public entities. In the circumstances, we are of the considered view that the appellant is not entitled to the payment of the commission sought from the respondent.

30. Accordingly, the appeal fails in its entirety and is hereby dismissed with costs to the respondent. Orders accordingly.



DATED AND DELIVERED AT NAIROBI THIS 18TH DAY FEBRUARY, 2022.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

