



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 1116 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 29th September, 2016)

NIXON ODUOR GOLLACLAIMANT

VERSUS

AUTO SUECO KENYA LIMITED RESPONDENT

JUDGMENT

Pleadings

1. The Claimant filed his claim on 29.6. 2015, through the firm of Ochieng, Onyango, Kibet & Ohaga seeking payment of earned commissions from the Respondent.
2. He states that he was employed by the Respondent as the General Sales Manager –Trucks until 30.6.2012 when he resigned from employment. He contends that under the terms of his engagement he was entitled to a salary as well as commission on sales. Upon his resignation he states that he was paid part of his commissions except for commission in respect of sale of ten trucks to a customer known as Delina Limited but promised to pay the same later.
3. On or about February, 2013, the Claimant states that he followed up with the Respondent on payment of outstanding commission and the Respondent requested time to calculate the margins earned from the sale of Delina Limited by the Claimant as well as confirm the amount due to the Claimant as commission.
4. He goes on to state that on April,2 2013, the Claimant inquired from the Respondent on payment of the outstanding commission and the Respondent through its Chief Executive Officer, indicated that the financial year had not been closed and undertook to revert with the proper amount once the same was done.
5. It is the Claimant's contention in his claim that despite the promise to pay commission the Respondent failed to do so. The Claimant in May 2013 held a meeting with the Respondent's Chief Executive Officer, who undertook to pay the Claimant the outstanding commissions by end of June, 2013.
6. In August 2013, the Respondent in breach of the Claimant's terms of employment and its previous undertaking to pay the commissions for sale to Delina limited informed the Claimant that it would not settle the same.
7. The Claimant states that the sale to Delina Limited was worth 780,000.00 Swedish Krona (SEK) and

the total selling price was SEK 7,800,000.00 at an exchange rate of Kenya Shillings. 13.3 making a total of Shs. 103,740,000.00. He alleges that he is entitled to 1% of the total amount of the ten trucks sold to Delina Limited totaling to Shs.1,037,400.00.

8. He prays for:-

1. The sum of Shs. 1,037,400.00.

2. Interest at the rate of 14% per annum from 1st July, 2012, till payment in full.

3. Costs of the suit.

9. The Respondent filed a Memorandum of Defence on 11th September, 2015, through the firm of Kaplan & Stratton wherein they deny the allegations in the Claim and state that the Claimant's contract of employment provided that commission payments would only be payable to him in respect of deals closed by the Claimant. They state that the Claimant resigned from his employment before a sale agreement for the sale of trucks to Delina limited was signed and concluded.

10. It is the Respondent's contention that the Claimant admitted that the said sale of trucks to Delina was a potential deal and not a closed deal at the time of this resignation and the sale of the trucks was eventually done after the Claimant had left employment. They further contend that the claim as drawn is excessive, false and deliberately misleading.

11. The Respondent state that the Claimant was employed as the General Sales Manager for the Respondent's Truck Division on 2nd September, 2009, but terms of the employment were subsequently reviewed vide a letter dated 20.3.2012, wherein it provided that Commissions would be payable to the Claimant in respect of deals closed by him and those closed by his team.

12. They further contend that commissions were only payable to the Claimant upon completion of marketing the Respondent's trucks and buses and obtaining of customers; negotiating with a potential customer and take the specifications of the trucks and buses that would be required; confirm with the manufacturer that the trucks and buses required by the customer are available; facilitate the preparation of the sale agreement; place the orders for specific type of truck and bus required with the manufacturers; continue to follow up with the manufactures and facilitate the importations and clearing process of the said trucks at the port of Mombasa; verify that the vehicles conform to the customers' specifications.

13. That the Claimant resigned from duty on 4th June, 2012, with his last day of work being 29.6.2012. It is the Respondent's position that the Claimant was aware of all the aforementioned responsibilities in respect of each sale and they refer to their "Appendix 4" which is an email from the Claimant containing details in respect of closed deals and potential deals he was pursuing. They state that the Claimant list Delina Ltd as a potential deal and not a closed deal.

14. The Respondent state that pursuant to the Claimant's resignation, a newly appointed Sales Manager continued to pursue the transaction and completed the negotiations on behalf of the Respondent leading to execution of a sales agreement on 31.8.2012 by the Respondent's CEO. Delina Enterprises paid for the said trucks on 7th February 2013 and commission in respect of the said trucks to the Sales Manager who negotiated, progressed and closed the deal.

15. It is the Respondent's contention that the Claimant was only entitled to commissions in respect of closed deals and acknowledged at the time of his resignation which was not the case for the Delina deal. The Respondent avers that the Claimant was paid all commissions in respect of deals that he had closed at the time of his resignation and not to any further payments.

16. The Respondent's deny promising the Claimant to pay him commissions as claimed and if at all any was promised it would only be part of the commission on the basis of good faith and calculations would

be done to determine how much would be payable.

Evidence

17. The Claimant in evidence reiterated the averments in the Memorandum of Claim adding that when he left the Respondent he had closed a deal with Delina Limited and his commissions were to be paid once the customer paid. He stated that he held meetings with the Respondent over the issue and followed up with an email to which the Respondent replied that they had not concluded calculations of the deal. He stated that he had not been paid any money to date.

18. The Respondent put up one witness one Mr. Afonso Martino who stated that closing a deal included trucks delivered to the customer, full payments received and registration in the name of the customer. That letters of credit is a document from the bank that indicates a strong possibility of payment and that it is not a guarantee that the deal had gone through.

19. RW1 also stated that the Claimant was paid for all closed deals and the Delina deal was not settled and the contract of sale was signed after the Claimant left employment. He prayed for the Claim to be dismissed.

Submissions

20. The Claimant submits that according to the new terms of engagement signed on 20.3.2012, they provided that:

“Commissions

a. Commission will be paid on the month following the truck payment from the customer, as per the commissions table;...

b. All deals including the deals done in foreign currency will be paid in Kshs. as per the exchange rate to the Kshs. of the day of the full pay from the customer.”

21. It is his submission that commissions as claimed are payable to him in lieu of the above cited contractual provisions.

22. He further states that he is entitled to commissions on the basis of the sale of 10 trucks to a customer, Delina limited while in the employment of the Respondent. He states that the Client had changed their mind and opted to buy a different brand of trucks (Iveco's) instead of Volvo's sold by the Respondent but he convinced them to buy the Volvo trucks instead.

23. He states that in evidence he produced communication relating to the purchase price, discounts offered, specifications of the trucks and reminders to Volvo head office for quotations. He states that he even followed up on the letters of credit whereas the Respondent did not lead any evidence on the negotiations that they conducted or any correspondence with Delina that happened in his absence.

24. It is the Claimant's submission that there is no difference between the date the commission was earned and when it was paid as all the terms of the sale were agreed on by 13.6.2012 and what was pending was the issuance of the letters of credit which were being processed by the bank. This fact does not disentitle him to credit as the letter dated 20.3.2012 clearly sets out the fact that payment would be at a later date. Neither does the said letter of 20.3.2012 make payment of commissions subject to the signing of a sale agreement.

25. The Claimant further states that the Respondent is estopped from denying that the Claimant is entitled to payment of commission. He states that in all the communication between him and the Respondent's representatives, the Respondent had intimated that they were going to pay his commissions subject to finalizing their calculations.

26. He prays for commission to the tune of Shs. 1,037,400.00 being 1 percentile of the total amount paid by Delina Limited for the trucks.

27. The Respondent in their submissions state that deals under the revised contract of employment accrued once deals were closed and not once a customer expressed his intention to purchase trucks as implied by the Claimant. They rely on email correspondence from the Claimant dated 21.6.2016 which attached a spreadsheet listing transactions that had been closed and potential deals. The Delina Ltd transaction was a potential deal and as such commissions did not lie.

28. Further, the Respondent states that the letters of credit were issued on 31.8.2012, after the Claimant had left employment. They submit that it would be difficult for businesses to operate and make profits if they were liable to pay commissions to their sales representatives based on customer inquiries and negotiations when there is no contract with the buyer. They rely on the case of **National Bank of Kenya Ltd Vs. Pipeplastic Samkolit (K) Ltd and another (2001) eKLR** where the Court of appeal held:

“...a court of law cannot rewrite a contract between the parties as the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

29. The Respondent submit that reference to the meetings and correspondences between the Claimant and the Respondent’s CEOs amount to a promise to pay which they are now estopped from denying. That the CEO’s did not admit the amount of Shs. 1,037,400.00 but rather indicated that calculations were ongoing and they would revert.

30. They submit that should the correspondences be deemed as an admission that commission was payable this would amount to a variation of express terms of the contract which provided that commissions would be payable once the deal was closed. They cite the case of **Kenya Breweries Ltd Vs. Kiambu General Transport Agency Ltd (2000) 2 EA 398** where a variation was defined as:

“a variation of an existing contract involves an alteration as a matter of a contract of the contractual relations between the parties. Hence, the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be ad idem in the same sense as for the formation of a contract. Indeed, the agreement for variation must further be supported by consideration.”

31. It is the Respondent’s submission that the e-mails relied on by the Respondent are vague, uncertain and are contradictory and do not show that there was a meeting of the minds by the parties. They cite the case of **Bakshish Singh & Brothers Vs. Panafric Hotels Ltd (1986) KLR 538** where it was held:

“To a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. An agreement between two parties to enter into an agreement in which some crucial point of the contract is left undetermined is no contract at all.”

32. The Respondent explains the CEO’s committing to pay commission is mistake. They state that Mr. Elvis Duran who made this representation of commission on behalf of the Respondent was a new CEO who had just reported to Kenya and the Claimant goes to great length to bring him up to speed on his case. In evidence they state that there is no response from the said Mr. Duran. Any representation made on payment of commission by the CEO they state is a mistake and none is payable.

33. On the doctrine of estoppel the Respondents submit that it cannot be relied upon as the basis for founding an action. They state that this doctrine can only be used as a shield and not a sword as reiterated in the case of **Doge vs. Kenya Cannery Ltd (1989) KLR 127.**

34. On the claim of interest, the Respondent submit that it would amount to unjust enrichment as the payments in contention were made in February 2013, and his claim for interest is from 1st July, 2012. Further that interest is a discretionary award and the Claimant has not laid a basis on why it should be

awarded.

35. The Respondents submit that the claims against the Respondent are false, misleading, misadvised and a blatant abuse of the Court process. They pray that the claims should be dismissed with costs.

36. Having considered evidence and submissions of the parties, there are 3 issues for determination:

1. Whether at the time the Claimant left the employment of the Respondent had concluded a deal with Delina Limited.

2. Whether the discussions and promises by the Respondent amounted to the acceptance of a deal made by the Claimant with Delina Limited.

3. Whether the Claimant is entitled to the prayers made in the claim.

37. On the 1st issue, the Claimant's contract with Respondent dated 27th August 2009, he was entitled to 50% commission on gross margin per truck or new trucks and 4.0% from gross margin per truck.

38. The Claimant contends that when he resigned on 1.7.2012 he was paid part of his commission except for commission in respect of sales of ten trucks to a customer known as Delina Limited which Respondent promised to pay later.

39. He told Court that the trucks he sold cost 750,000/= Swedish krona whose conversion rate was 13.3 Ksh to 1 Swedish Krona so the total cost came to 103,740,000/= out of which he was entitled to 10% of agreed value which was about 1,037,400/=.

40. The Claimant contends that he had already struck the deal with the customer only that the customer had not paid at the time he left employment.

41. The Respondents on their part denied that the Claimant had closed a deal with Delina Limited as deals closed includes trucks delivered to the customer and full payment is received and registration of trucks in the customer name. After this, all costs related to sale is reflected.

42. The Claimant contends that he had sealed the deal because he wrote an email to the Respondents on this issue on Wednesday 13.6.2013 before his resignation indicating that the bank had requested he confirms in writing that they had received 20% customer contribution which he suggested they write on Monday. The bank had also indicated they will pay for the sales within 45 days and would need the trucks registered jointly with the customer amongst other conditions.

43. The Claimant resigned on 1.7.2012 and he inquired about the status of the deal in February 11, 2013 stating that he was aware that the trucks had arrived in Dar es Salam and was asking if they could discuss his commission.

44. The Respondent replied to this email indicating that they had not concluded the calculations to the deal but as soon as it is done, they would get in touch with him. He also wrote a reminder on 18/2/2013 and the Respondents replied indicating as follows:

"Hello Nixon

Thank you very much for your email. When I received your email, I took the highest attention to its content and took some time to gather all the information.

As you are aware that this transaction was done through our Tanzania Company and either ASKenya and AS Tanzania have not closed the financial records for 2012, so we have not consolidated the financial gains on this deal.

I will revert with the proper amount once it is done.

BR

Elvis”

45. I have looked at the above communication which began before the Claimant’s resignation. At the time of his exist on 1.7.2012, he had some communication with Delina Limited which led to an agreement to sell 10 trucks to Delina.

46. The Claimant indeed put in a lot of man hours as seen from the communication on this file with this particular customer where an agreement to purchase was agreed on and the bank was involved.

47. It is my position that the communication between the customer and the Claimant and the Respondent is proof that the deal though not finalized to delivery and payment for the trucks, the Claimant did over 80% of the required work and the Respondent cannot turn back to say he was not entitled to any commission.

48. The communication with the Claimant from Respondent as late as 2013 also indicated that Respondent were going to pay the commission only that they were working on some calculations.

49. It is my finding that the Claimant indeed concluded this deal because the Respondents have not adduced any other additional evidence to show what was done over and above what Claimant had achieved to finally have the deal concluded other than the signing of the agreement in August 2012.

50. Thus my finding is that the Claimant concluded this deal and I will put it in the category of deals closed by himself but at less than 100% which I put at 80%.

51. The communication by Respondent also shows their willingness to pay for the commission earned and so they are estopped from denying the same at this stage. My preposition therefore answers (1) and (2) issues above.

52. On the last issue, I find that the Claimant is entitled to the payment of commission as was the agreement with the Respondent and this I find is as per the letter dated 20th March 2012 to the Claimant which translates at 1% of gross margin but which I cup at 80%.

53. The amount due then is **Kshs.829,920/=**.

54. Plus costs of this suit.

Read in open Court this 29th day of September, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odhiambo holding brief Miss Oduor for Claimant

No Appearance for Respondent