



REPUBLIC OF KENYA



Great Link Insurance Agency v Resolution Insurance Limited & another (Commercial Appeal E243 of 2021) [2024] KEHC 16954 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEHC 16954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL APPEAL E243 OF 2021**

F WANGARI, J

JUNE 28, 2024

BETWEEN

GREAT LINK INSURANCE AGENCY APPELLANT

AND

RESOLUTION INSURANCE LIMITED 1ST RESPONDENT

COMMISSIONER OF INSURANCE 2ND RESPONDENT

(Being an Appeal from the Judgement of the Insurance Appeal Tribunal at Nairobi {Hon. Chair Wambua Kilonzo and the majority members} dated 18th November, 2021 in Insurance Appeal No. 2 of 2021)

JUDGMENT

1. This is an appeal from the judgement of the Insurance Appeal Tribunal at Nairobi (Hon. Chair Wambua Kilonzo and the majority members) given on 18th November, 2021 in Insurance Appeal No. 2 of 2021.
2. The Appellant being dissatisfied with the said judgement preferred the present appeal and raised thirteen (13) expansive grounds of appeal which among them are that the Majority members of the tribunal erred in law by shifting the burden of proof to the Appellant herein even after all the members unanimously appreciated the 2nd Respondent had powers to review his earlier decision and thus the Appellant herein had sufficiently discharged his burden of proof as per section 151 (1A) and section 2 of the *Insurance Act* before the 2nd Respondent.



3. I have not set out all the grounds of appeal for the very reason that they are argumentative and repetitive contrary to Order 42 Rule 1 (2) which provides as follows: -

“The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.” (Emphasis added)

4. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

“...We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court...” (See Abdi Ali Dere v Firoz Hussein Tundal & 2 Others [2013] eKLR and Nasri Ibrahim v IEBC & 2 Others [2018] eKLR)

5. In the latter case, the Court lamented thus: -

“...We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in any way enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs...”

6. It is high time that Counsel take their time and strive to be concise and to the point in relation to drafting their grounds of appeal. When parties come up with so many grounds of appeal, one may be tempted to think that a party is simply but chancing on at least one of the grounds succeeding. I am alive to the fact that even a single ground of appeal is sufficient to dispose off an appeal and thus parties ought to thrive to look through the decision they are dissatisfied with and come up with concise grounds and avoid repetitions, arguments or narratives. Be that as it may, the court has a responsibility to apply its mind on the grounds proffered with a view of arriving at a judgement either way.

7. Having noted the foregoing, the Appellant thus prayed that the judgement and or decision of the majority members of the Tribunal delivered on 18th November, 2021 be set aside and the decision of the Commissioner of Insurance dated 8th December, 2020 be confirmed, the 1st Respondent be ordered to pay the Appellant herein commission of Kshs. 9,622,598.00 within 7 days failure the 2nd Respondent takes administrative action against the 1st Respondent or the Appellant to execute, costs against the 1st Respondent both in this court and in the Tribunal, interests on the pleaded amount at court rates and any other relief be granted as the court deem fit and just to so grant.

8. Prior to dealing with the substantive appeal, several interlocutory applications were filed and were finally dealt with allowing the court to now deal with the substantive appeal.



Genesis of the Dispute

9. The brief facts are that in the year 2019, the MJ Group of Companies made a proposal to the 1st Respondent to place its staffs' medical insurance business with them (1st Respondent). The formal tendering process was undertaken and on 16/12/2019, the 1st Respondent was notified by MJ Group of Companies/Grain Bulk Handlers Ltd of its successful placement.
10. The Appellant and the 1st Respondent adopted rival positions as to whether the Appellant was an agent in the strict sense of section 2 of the *Insurance Act* and specifically the MJ Group of Companies/Grain Bulk Handlers Ltd business. As for the 1st Respondent, prior to the successful placement of the 1st Respondent as the medical cover provider for MJ Group of Companies/Grain Bulk Handlers Ltd, one Ms. Shakila Babu had been the focal point in placing of the business from the time of expression of interest to the point of award of the business to the 1st Respondent and was thus the one entitled to commission.
11. However, the Appellant's position was that before the award of the business to the Appellant on 16/12/2019, it had executed an agreement with the 1st Respondent appointing the Appellant as its duly authorized agent on 4/12/2019. This is what precipitated the conflict as to which agent actually solicited and/or procured the business from the MJ Group of Companies/Grain Bulk Handlers Limited and placed the same with the 1st Respondent.

Complaint

12. On 20/2/2020, the Appellant lodged a complaint with the 2nd Respondent claiming that the 1st Respondent had failed and/or refused to pay its due commission in relation to soliciting or procuring the business between MJ Group of Companies/Grain Bulk Handlers Ltd and the 1st Respondent. On 8/4/2020, the Respondent responded to the complaint and held that the Appellant had not demonstrated any role it played in soliciting or procuring the business in issue.
13. Upon receipt of the decision of 8/4/2020, the Appellant moved the 2nd Respondent to review its findings and after a series of correspondences and meetings held between the parties, the 2nd Respondent made another decision on 8/12/2020 reviewing its findings of 8/4/2020 and directed the 1st Respondent to pay the Appellant the commission due from the business within seven (7) days of the letter and submit evidentiary proof of payment. The basis of this finding was that the Appellant was the duly appointed agent for the business in issue in consonance with the provisions of section 151 (1A) of the *Insurance Act*.
14. With this decision, it was now the 1st Respondent's turn to complain. On 15/12/2020, the 1st Respondent lodged its protest letter questioning the 2nd Respondent's legal basis for making the findings of 8/12/2020. Having considered all the circumstances, the 2nd Respondent made a final decision on 19/5/2021 affirming its decision contained in the letter dated 8/12/2020. This is what precipitated the appeal before the Insurance Appeals Tribunal.

The Appeal before the Insurance Appeals Tribunal

15. The appeal was lodged on 21/6/2021. Prior to the appeal being heard, the Appellant herein filed a Notice of Preliminary Objection dated 16/7/2021 on 19/7/2021. It raised several issues among them that the appeal filed on 21/6/2021 was time barred under the provisions of section 173 (1) of the *Insurance Act*. The Tribunal considered the objection and through its ruling delivered on 23/8/2021,



it dismissed the objection and granted leave to the 1st Respondent to file its statement of facts out of time but awarded costs of the objection to the Appellant.

16. The appeal was heard by way of the parties' respective pleadings and oral submissions made by counsel. The same are well summarized in the Tribunal's judgement which appears at pages 815 to 838 of Volume 2 of the Record of Appeal. I shall not rehash the same. Having considered the pleadings as well as parties' oral highlights, the Tribunal fashioned three issues for determination. These are: -
 - i. Whether the Commissioner of Insurance has power to review his own decision (s);
 - ii. Whether the Commissioner of Insurance erred in law in ordering the Appellant to pay the Interested Party commission for the MJ Group business; and
 - iii. Who is to bear the costs of this appeal.
17. On the first issue, it found that the Commissioner of Insurance has power to review his own decision (s). On the second issue, the Tribunal made a finding that the Appellant did not provide proof of its participation in the tender process until the award was made. It therefore returned a finding the Commissioner of Insurance erred in ordering the 1st Respondent to pay the Appellant commission for the MJ Group's insurance business. On costs, it ordered each party to bear own costs. With the finding on the second issue, it allowed the appeal. This is what has aggrieved the Appellant.
18. Directions were taken that the appeal be canvassed by way of written submissions. All parties duly complied by filing detailed submissions and cited various authorities in support of their rival positions. The Appellant's submissions are dated 9/2/2024. It also filed its list of authorities of even date. The submissions for the 1st and 2nd Respondents are all dated 6/3/2024 while those of the Respondent are dated 8/11/2023.

Appellant's Submissions

19. The Appellant grouped its thirteen (13) grounds of appeal into three broad groups and urged grounds 1, 3, 4, 5 and 8 together, grounds 2, 3, 6, 10 and 11 together and grounds 7, 12 and 13 together.
20. On grounds 1, 3, 4, 5 and 8, the Appellant submitted that the majority members of the tribunal erred in shifting the burden of proof to the Appellant to prove appointment by the 1st Respondent when indeed the Appellant had discharged the burden before the 2nd Respondent. It contended that it had proved how it was appointed by the 1st Respondent to undertake MJ business through the agency contract signed on 4/12/2019 and the 1st Respondent's approval of change of agency through the email dated 20/12/2019. The subject email was quoted verbatim in the submissions and I therefore do not find it necessary to rehash the same.
21. To buttress these grounds, the Appellant referred to an affidavit sworn by one Selemani Mbewa who confirmed to have witnessed the brokerage agreement in favour of the Appellant on 4/12/2019. It was further submitted that the majority of the Tribunal erred in law as they were barred by the doctrine of estoppel from questioning the appointment of the Appellant as confirmed by the 1st Respondent's email of 21/12/2019 and copied to the Appellant.
22. The Appellant further submitted that majority members of the Tribunal erred in law by contradicting themselves by saying that the 1st Respondent denied the agency agreement originated from them. The Appellant further submitted that the 1st Respondent admitted to the existence of the agency agreement and referred to page 915 of the Record of Appeal. It concluded that there was an agency agreement and the Appellant performed its part of the contract and thus entitled to its commission.



23. On grounds 2, 3, 6, 10 and 11, the Appellant submitted that the majority tribunal failed to consider the material the Appellant had placed before it especially in terms of section 2 of the [Insurance Act](#) on who an agent is. The Appellant contended that it serviced the MJ Business for a whole year and thus a misnomer not to be paid its commission. The Appellant submitted that it would have been easier for the 1st Respondent to stop it from discharging her duty as an agent from the onset instead of appointing her and letting her service the MJ Group business and eventually declining to pay her commission. The Appellant then referred to clauses 3.1 and 5.1 of the agency agreement on parties being bound by their contract.
24. On ground 3 of the appeal, the Appellant submitted that the 1st Respondent was estopped from denying the Appellant's entitlement to commission when it had paid a sum of Kshs. 168,068.35/= on 14/7/2020 and cash Kshs. 101,511.84/= but when queried about the payment as opposed to full commission, the 1st Respondent only acknowledged the email and said they had queried with the finance team and shall revert once they get a response on the same. It was the Appellant's submissions, that it was an error of law for the majority tribunal to disregard section 120 of the [Evidence Act](#) as applied in the case of *Geminia Insurance Company Limited v Albert Ojonjo t/a First Class Insurance Agency* [2015] eKLR.
25. On grounds 7, 12 and 13, the Appellant submitted that the majority tribunal erred in law by failing to observe rules of natural justice and fairness as the 1st Respondent's alleged agent Shakila Babu was not an agent as per section 2 of the [Insurance Act](#) but an employee of the 1st Respondent. It made reference to the portfolio management agreement of 1/1/2019. It was further submitted that the said Shakila Babu did not raise any complaint that the Appellant wanted to benefit from her commission. In conclusion, it urged that the appeal be allowed with costs and interests on the pleaded sum.

1st Respondent's Submissions

26. The Respondent identified three (3) issues for determination which are: -
- i. Whether the court has jurisdiction to hear and determine the appeal;
 - ii. Whether the court can grant leave where the court has not sought the same; and
 - iii. Whether the Appellant can be paid as a preferential creditor.
27. Considering this court's ruling of 30/5/2024, the first two issues are deemed spent and as such, the court will not summarize that which will not form the basis of its determination. I shall thus confine myself to the submissions in relation to the third issue. It was submitted that the court does not have any authority to ignore or deviate from express provisions of statute.
28. Making reference to the second schedule of the [Insurance Act](#), the 1st Respondent contended that there is a hierarchy on the priority of claims that ought to be applied once a company is under liquidation. Accordingly, the Appellant does not fall within the definition of a preferential creditor as provided for. Therefore, the Appellant cannot arbitrarily and capriciously skip ahead of other preferential creditors. Such an action would destabilize the liquidation process through interference with the hierarchy of claims. It cited section 471 (1) of the [Insolvency Act](#).
29. It was submitted that in any event, the Appellant would not be able to execute its judgement after liquidation as such an execution would destabilize the hierarchy and equality of creditors. It made reference to section 230 of the [Insolvency Act](#). The case of *Ndane Construction Company Limited v Spencon Kenya Limited* [2016] eKLR was referred to in explaining the purposes of the provision. Lastly, it was submitted that the issue on whether the Appellant ought to be treated as a preferential



creditor was raised for the first time on appeal and in any event, the Appellant has failed to advance any reasons why it should be treated as a preferential creditor contrary to what the statute provides.

30. In conclusion, the 1st Respondent concluded that the appeal ought to be dismissed with costs.

2nd Respondent's Submissions

31. The 2nd Respondent's submissions are in support of the appeal and they reflect much what the Appellant has submitted. I therefore do not find it a good use of the scarce judicial time if I were to reproduce the same save to state that I am grateful to Counsel for the industry in putting in well researched submissions and citing various provisions of the law and judicial decisions in support of the appeal. They go a long way in aiding the court contextualize the matter and render a just decision either way.

Analysis and Determination

32. This is a second appeal. As such, the court is only confined to matters of law unless it is shown that the court below considered matters it should not have, or failed to consider matters it should have considered or looking at the entire decision, it is perverse. The Court of Appeal in *Kenya Breweries Limited v Godfrey Oduyo* [2010] eKLR rendered itself thus: -

“...In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse...”

33. I have considered the appeal lodged, the submissions filed both for and against which I have summarized as above, the authorities cited as well as the law and I discern the following issues for determination: -

- a. Whether the Majority Tribunal erred in allowing the appeal;
- b. If the answer to (a) is in the affirmative, what orders should issue?
- c. Who bears the costs?

34. I discern only one disputed point which is whether the Appellant was entitled to be paid commission by the 1st Respondent. In answering this issue, it would be imperative to make a determination of whether the Appellant was an agent in the narrow sense of MJ Group of Companies/ Grain Bulk Handlers Ltd staff health insurance. There is no dispute that the Appellant and the 1st Respondent entered into a brokerage/agency agreement. At clause (b) of the recital part of the agreement, it provided as follows: -

“Resolution desires to engage the services of the Broker to solicit, procure and place with its insurance business from the general public on its behalf.”

35. At clause 1 (a) on appointment, the same agreement provided as follows: -

“Resolution hereby appoints the Broker and the Broker hereby accepts the appointment to be such an Insurance Broker and in the capacity to solicit insurance business on behalf of Resolution.”



36. Clauses 3 and 5 of the agreement provided that the 1st Respondent shall pay and remunerate the Appellant commissions payable to it for any new business under qualifying products. To this end, there is no dispute whatsoever as to the relationship of the two (2) warring parties herein. The point of departure is whether the Appellant was entitled to commission on account of MJ Group of Companies. The 1st Respondent maintains that between August, 2019 and 16th December, 2019, it was one Shakila Babu who was the agent and it is during this period that the said Shakila who procured, solicited and placed the MJ Group business.
37. However, the Appellant maintains that the said Shakila was not an agent as per the provisions of the Insurance Act but an employee. Reference was made to the portfolio management agreement dated 1/1/2019. To put the issue into its correct context, reference to the definition of an agent under the Insurance Act would be necessary. Section 2 of the Act defines an agent as follows: -
- “Agent” means a person, not being a salaried employee of an insurer who in consideration of a commission, solicits or procures insurance business for an insurer or broker” (Emphasis added)
38. From the above definition, it is clear beyond peradventure that a salaried employee of an insurer cannot be said to be an agent. An agent strictly applying the definition above is only entitled to a commission. However, in consideration of this commission, he must give something back in return which is to solicit or procure insurance business for an insurer (the 1st Respondent herein) or a broker (the Appellant herein).
39. Can any person transact business on behalf of an insurer? The answer lies in section 150 (1) of the Insurance Act which provides as follows: -
- “No person shall, after the expiry of three months from the appointed date, commence, transact or carry on in Kenya the business of a broker, agent, risk manager, motor assessor, insurance investigator, loss adjuster, insurance surveyor, medical insurance provider, or claims settling agent unless he is registered under this Act.”
40. Section 151 (1A) on its part provide as hereunder: -
- “Notwithstanding the provisions of subsection (1), a registered agent shall seek to be appointed by an insurer before transacting business on their behalf.”
41. How does an agent gets appointed? It must be through an agency agreement setting out the parties’ duties, entitlements, responsibilities and obligations under the agreement. Having reviewed the two (2) volumes of appeal, I only found one such agreement which is between the Appellant and the 1st Respondent. At paragraph 115 and 116 of the Appeals Tribunal’s judgement, I note the following sentiments: -
115. The Tribunal has also considered the formal instrument by which the Appellant appointed the Interested Party as Agent of MJ Group business as is required under the Insurance Act.
116. The said agency agreement is made on 1st February, 2020 and is executed by the Appellant on 12th March, 2020 and by the Interested Party on the same day.
42. As noted above, there is only one agency agreement which is undated but fully executed. I also note that at paragraph 119 of the Tribunal’s judgement, clause 2.1 of the purportedly dated Agency Agreement



is produced verbatim. However, the Agency Agreement which appears at pages 801 to 809 does not contain such clause. Clause 2 is titled 'Duration' and clause 2.1 provides as follows: -

“ This Agreement shall commence upon execution and is for a term of 12 months.”

43. To lend credence to the above, the Appellant submits that the agency agreement was executed on 4/12/2019 and not on any other date. Though the agreement referred to is undated, the same is corroborated by the affidavit of one Selemani Mbewa (see pages 199 to 200 of the Record). The same Selemani Mbewa signs as a witness for one Mwanamisi Rama Nondo who is a representative of the Appellant. Therefore, with no dated agency agreement as alluded by the Tribunal, I hold that the agency agreement was executed on 4/12/2019 way before the award was made on 16/12/2019.
44. Even if this was not the case, I have perused through the portfolio management agreement dated 1/1/2019 (see pages 232 to 238 of the Record) and I have no hesitation to hold that the said Shakila Babu was not an agent within the meaning of section 2 of the Act. No agency agreement was produced to back such an allegation and in any event, there is no formal appointment as per the requirements of section 151 (1A). I hold and find that the said Shakila Babu was an employee and thus outside the definition of an agent under the Act.
45. Having found as above, was the Appellant an agent? First, it signed an agency agreement with the 1st Respondent entitling it to commissions for any work procured and solicited for the 1st Respondent, was duly appointed under section 151 (1A) of the Insurance Act and indeed was in charge of MJ Group's business for the entire 2020. Having met the above prerequisites, I have no hesitation to faulting the Tribunal's findings on the issue of agency.
46. The Tribunal's only reason to overturn the 2nd Respondent's decisions was based on the entry point of the Appellant in terms of soliciting and procuring insurance business for the Appellant. According to the Tribunal, it was after the award of the tender. However, as found above, this was not the case.
47. The 1st Respondent having paid some funds to the Appellant in July, 2020 and which funds have never been demanded back, it was not open for it to turn around and say the Appellant was not entitled to commission on account of MJ Group business. This is conduct which the law frowns upon and despite estoppel being an equitable principle, it has been codified under our laws and in particular the Evidence Act which at section 120 decrees as follows: -

“ When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

48. If the amount paid to the Appellant was erroneous as alleged, nothing stopped the 1st Respondent from demanding it back. This was not done and as such, the 1st Respondent lost its right to lay claim on the subject amount. The Court of Appeal in *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR held as follows: -

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

49. Before concluding, there is an issue raised by the 1st Respondent on the issue of preferential creditors. I note that leave to proceed with the matter was granted on 30/5/2024. However, I do not wish to



make a determinative finding on this aspect as this was only addressed by the 1st Respondent in its submissions. The other parties did not address it since it was not a matter that was before the two (2) courts below. Execution is part of the proceedings and I am of the view that the said bridge will be crossed when parties get there.

50. On the issue of costs, a careful reading of Section 27 of the *Civil Procedure Act* indicates that it is trite law that they follow the cause or event as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540. It is that costs must follow the event unless the court, for some good reasons, orders otherwise. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exist some other good reasons and or cause for not awarding costs to the successful party.

51. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”

52. Any departure from this trite law can only be for good reasons which the Supreme Court in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted as follows:

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

53. I have said enough to show that award of costs is intertwined with the court's exercise of discretion. In the circumstances, I order that each party to bear own costs.

54. Flowing from the above, I proceed to make the following disposition: -

- a. The appeal has merit and the same is hereby allowed on terms that the Appellant is entitled to its commission of Kshs. 9,622,598/= to be paid by the 1st Respondent;
- b. The amount in (a) above shall attract interest at court rates from 19th May, 2021 till payment in full; and
- c. Each party to bear own costs.



It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 28TH DAY OF JUNE, 2024.

.....

F. WANGARI

JUDGE

In the presence of:

Mr. Mungai Advocate for the Appellant

N/A for the 1st Respondent

N/A for the 2nd Respondent

Mr. Barille, Court Assistant

