

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT NO 301 OF 2012**

**INSURANCE COMPANY OF EAST AFRICA}.....PLAINTIFF**

**VERSUS**

**KITAGENDA MUHAMMED}.....DEFENDANT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

The Plaintiff's action is for a declaration that the Defendant is not a licensed insurance agent and is thereby not entitled to insurance commission. Secondly, it is for an order for refund of money amounting to US\$61,077 paid to the Defendant as commission. Thirdly, it is for an order to restrain the Defendant from acting or holding out as an agent of the Plaintiff. Fourthly it is for general damages for misrepresentation. Fifthly it is for costs of the application to be provided for. Finally the Plaintiff prays for interest on the principal claim of US\$61,077 and general damages as well as on the costs of the suit at the rate of 30% per annum from the date of judgment till payment in full.

In support of this suit, the Plaintiff's case is that it engaged the Plaintiff as an insurance agent since October 2004 by a pre-contract agreement dated 6<sup>th</sup> of October 2004. Subsequently the Plaintiff executed a tied insurance agent agreement with the Defendant on similar terms and the Defendant has been dealing with the Plaintiff in that capacity over the years. The Plaintiff asserts that it is a term of the tied insurance agreement and clause 3.3 thereof that the agent shall at all times comply with all applicable laws and regulations while soliciting for business and to obtain and maintain a license/registration as required by the law. The Plaintiff contends that it is a mandatory legal requirement under section 72 (1) of the Insurance Act for the agent to have a valid insurance agent allowances to legally act as an insurance agent and transact business as insurance agents. The Plaintiff's case as disclosed in the pleading is that sometime in January 2012 the Defendant with the intention to induce the Plaintiff to pay him a commission, lodged a claim for commission in the accounts Department of the Plaintiff fraudulently misrepresenting that he had pioneered or solicited business from Kolin Insaat Turizim (the client) when this was not true. Secondly the Defendant fraudulently misrepresented to the Plaintiff that he was a licensed insurance agent for the year 2012 whereas not. Relying on that misrepresentation, the Plaintiff unknowingly paid the Defendant commission of US\$61,077. Subsequently the Plaintiff

learned from the client that the business had been placed directly with the Plaintiff and the Defendant was not in any way involved when the company decided that Insurance cover with the Plaintiff. It was also discovered that the Defendant was not a licensed insurance agent for the year 2011 and 2012. Subsequently the Plaintiff demanded for refund of the money advanced to the Defendant which the Defendant refused or ignored to refund despite various demands for it. The Plaintiff accordingly filed this action for refund and declarations as stated above.

By a written statement of defence, the Defendant denied all the allegations in the plaint and asserted that it was due to his good performance that he was elevated to a Unit Leader Agent according to an appointment letter attached. Secondly it was the duty of the Plaintiff, as it has always been the case, to pay requisite fees for purposes of acquiring licences for the Defendant and which licence was always kept in full custody of the Plaintiff. The Defendant averred that he never personally submitted an application form or applied for a licence for the time he was with the Plaintiff. So it was the duty of the Defendant to process the licensing. Furthermore he avers that he was the one who solicited for business from the client, the subject matter of the suit. In total surprise the Defendant only received US\$22,077 and the rest of the money was confiscated by the top management of the Plaintiff who received it through impersonation in the name of the Defendant contrary to the law. Upon receiving the said money the Defendant was approached by the chief executive officer Mr John Karionji for a share. Finally he denies misrepresenting himself to the Plaintiff in anyway.

At the hearing the Plaintiff was represented by Counsel Emoru Emmanuel while the Defendant was represented by Counsel Kiwanuka Abdulla.

The Plaintiff called one witness namely the Chief Executive Officer Mr John Karionji but the Defendant never attended court nor produced any witnesses. The Defendant's Counsel attended court and cross examined the Plaintiff's witness. Subsequently, upon failure of the Defendant to produce his evidence within the time limited, Counsels were directed to address the court on the merits of the suit.

While the above is true, it cannot be said that the Defendant never adduced any evidence because in compliance with Order 12 rule 1 of the Civil Procedure Rules, Counsels of the parties executed a joint scheduling memorandum giving points of agreement and disagreement of the parties for the mandatory scheduling conference. Therefore certain facts are agreed upon by both Counsels which agreement is binding on the clients and the same can be treated as the evidence agreed to by the Defendant. Both Counsels addressed the court in written submissions.

The Plaintiff's Counsel submitted after referring to the facts on the following issues namely:

1. Whether the Defendant was paid a commission of US\$61,077 in respect of business concluded between the Plaintiff and Kolin Insaat Turizim?
2. Whether there was any misrepresentation on the part of the Defendant to the Plaintiff?

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

3. What remedies are available to the parties?

**Whether the Defendant was paid a commission of US\$61,077 in respect of business concluded between the Plaintiff and Kolin Insaat Turizim?**

The Plaintiff submitted that this question should be answered in the affirmative because there is overwhelming evidence that the Defendant was paid and received a total sum claimed of US\$61,077. This is a question of fact. PW1 Mr John Karionji exhibited five payment vouchers. The Plaintiff relied on exhibit P3, dated 3<sup>rd</sup> of February 2012 for US\$8615, exhibit P4 dated 3<sup>rd</sup> of February 2012 for US\$20,385, exhibit P5 dated 8<sup>th</sup> of February 2012 for US\$5077, exhibit P6, dated 1<sup>st</sup> of March 2012 for US\$7000, exhibit P7, dated 1<sup>st</sup> of March 2012 for US\$20,000 with all payments amounting to US\$61,037. The payments in exhibit P3 and P4 were admitted by the Defendant in his written statement of defence. However the admitted documents have amounts which do not add up to US\$22,077 but add up to US\$29,000. The other exhibits show that they were paid to the Defendant and as testified by PW1. PW1 was familiar with the handwriting of the Defendant and proved that the Defendant received the monies in the various exhibits referred to above. The Plaintiff relies on section 45 of the Evidence Act Cap 6 laws of Uganda for the court to form opinion as to the person by whom any document was written or signed through a person well acquainted with the handwriting of the person whose signature is called to question. PW1 proved that the signature in question was that of the Defendant and the PW1 was familiar with the handwriting and signature of the Defendant. The crux of the evidence was that the Defendant did not have different signatures. One signature was a longer signature or a full signature of the Defendant while the other signature was a short form of the signature.

In the premises the Plaintiff's Counsel prayed that the court should find on the balance of probability that exhibit P5, P6 and P7 and the sums indicated therein were paid to and received by the Defendant. Secondly that the court should find that the total sum paid to and received by the Defendant as a commission referred to above is a sum of US\$61,077.

In reply the Defendant's Counsel submitted that it was the Defendant who personally solicited for an insurance business with the client in question. Secondly the Defendant eventually paid only US\$22,077 and the rest was fraudulently received by the Plaintiff's top authorities impersonating the Defendant and the Defendant is still claiming part of that commission to which he is entitled. Furthermore, it is the Defendant's defence that it was a matter of practice for the Plaintiff to always renew its agent's licences throughout the agency up to the year 2011 when the Plaintiff fraudulently and without the Defendant's knowledge, refused to renew his licence.

As far as the first issue is concerned, the allegation is that the Defendant was paid a commission of US\$61,077. The Plaintiff only admitted in the WSD a sum of US\$32,077 and that the rest was fraudulently obtained by the Plaintiff's top officials through impersonation of the Defendant. The

Defendant's Counsel relies on the cross-examination of PW1 and submitted that the exhibits in question which purported to be payments made to the Defendant confirmed that Alex Makata one of the Defendant's top officials received the money by impersonating the Defendant. The documents lacked the Defendant signature and is indicated therein that Mr Alex signed for them. Consequently the money received under the questioned documents cannot be attributed to the Defendant. The Defendants Counsel submitted that the Plaintiffs witness PW1 failed to give any explanation why exhibits D4, P5 and P6 bear the name Alex and failed to show that the signature of the Plaintiff was on the documents. He agreed that Alex was one of the top officials of the Plaintiff Company.

In the premises he contended that the Defendant never received the money reflected in exhibit P5 and P6 and exhibit P7. Section 45 of the Evidence Act does not apply to the circumstances. It does not apply where the purported owner of the document or signature denies it but rather applies where a document signature this to be proved by the author who could not be produced to prove it for example where the author is dead.

### **Judgment**

I have carefully considered the above issue which deals with a question of fact as to the amount of money actually received by the Defendant. On the other hand, and on the issue of remedies, the Plaintiff relies on sections 72 and 37 of the Insurance Act. He contends that section 72 prohibits the carrying out of an insurance agent business without a valid licence granted by the Insurance Commission. Secondly, section 37 of the Insurance Act prohibits the payment of a commission by an insurer to an intermediary who is not licensed under the Act.

The Plaintiff and the Defendant both rely on the agreed facts in the joint scheduling memorandum which include the fact that the Defendant was not a licensed agent for the year 2011 and 2012. The fact is not contested except for who was supposed to obtain the licence.

In the joint scheduling memorandum, the following facts are agreed to under the hand and signature of Counsels of both parties.

1. That the Defendant was engaged by the Plaintiff as an insurance agent since October 2004 by a pre-contract agreement dated 6th of October 2004.
2. Subsequently, the Defendant executed a Tied Insurance Agent Agreement on the 1<sup>st</sup> of May 2005.
3. By virtue of this position, the Defendant was vested with authority and capacity over the years to negotiate and conclude insurance contracts on behalf of the Plaintiff.
4. The Defendant did not possess a valid insurance agent licence for the years 2011 and 2012.
5. The Defendant was paid and received part commission totalling to US\$22,077.

6. The Plaintiff demanded for refund of the money but the Defendant refused and declined to refund the said monies but continued to demand for the balance as commission.

In light of the above facts I have further deemed it necessary to consider the basis of the illegality alleged against the Defendant as to whether it includes culpability on the part of the Plaintiff. As far as paragraph 5 of the plaint on particulars of misrepresentation and fraud are concerned, the Plaintiff alleges among other things that the Defendant fraudulently represented that he had sourced for insurance business from the client whereas not. Secondly that the Defendant held out to be a licensed insurance agent for the year 2012 whereas he was not. Thirdly that the Defendant received commissions from the Plaintiff well knowing that he was not entitled to receive the same. The Plaintiff claims to have acted on the false representation of the Defendant to its loss and detriment. Particularly the Plaintiff's claim against the Defendant relates to insurance cover offered by the Plaintiff to Kolin Insaat Turizim.

I have carefully considered the pleadings as well as the facts and the point of law relating to the insurance cover given to the client. The relationship between the Plaintiff and the Defendant is contractual. Paragraph 2 of the admitted facts, admits a contract between the parties executed in the year 2005. This contract was tendered in evidence by consent of the parties under list of admitted documents relied on by the Plaintiff in the joint scheduling memorandum and was marked exhibit P2. It is the tied insurance agent agreement dated 1<sup>st</sup> of October 2005 exhibited at page 14 of the joint trial bundle. I have carefully read the contract and find relevant to the question of the implications of the agreed fact number four that the Defendant did not possess a valid insurance agent licence for the years 2011 and 2012 clause 3.3 of the admitted contract. Clause 3.3 provides as follows:

"Compliance with all applicable laws and regulations – The TA shall at all times comply with all applicable laws and regulations whilst soliciting business, and before soliciting such business he shall obtain and thereafter maintain in effect a licence/registration certificate which he may be required to hold by the laws of Uganda. Contravention of this provision shall constitute a breach of this agreement, which shall thereupon be rendered null and void."

This contract is binding on the Plaintiff and the Defendant and clearly stipulates that contravention of clause 3.3 renders the contract null and void and that it would constitute a breach of the agreement. The admitted fact is that for the period in question the Defendant was not a licensed person. In other words this was in contravention of clause 3.3 of exhibit P2 admitted by consent of the parties. Furthermore, the Defendant admits to have received in the WSD a sum US\$22,077. This was further admitted to be in error as the correct sum is US\$32,077. The Defendant through Counsel further submitted that this was the fruit of the Defendant's labour for soliciting personally the business of insurance of Kolin Insaat Turizim.

While the alleged admission by the Defendant would amount to a flagrant breach of the contract, I would however not conclude the issue but would refer to the related statutory provisions relied on by the Plaintiff's Counsel before concluding the issue. The statutory provisions are sections 37 and 72 of the Insurance Act Cap 213.

Section 37 provides as follows:

"Commission payable to licensed intermediaries

No insurer shall pay any commission or remuneration to any intermediary who is not licensed under this Act."

The word "intermediary" is actually defined by section 2 (h) to mean:

"... a person who invites other persons to make offers or proposals or to take other steps with a view to entering into a contract of insurance with an insurer, but does not include a person who merely publishes an invitation to the order of another person;"

Intermediaries are provided for under Part VIII of the Act. Under this part of the Act section 72 of the Insurance Act cap 213 provides as follows:

"Brokers, agents, etc. to be licensed.

(1) No person shall carry on the business of an insurance or reinsurance broker, an insurance agent, risk manager, a loss assessor, a loss adjuster, and insurance surveyor or a claims settling agent unless he or she is licensed for the business by the commission."

The question before the court is whether the Defendant carried out the business of an agent without a licence. This question will be answered in the affirmative because it is an agreed fact in paragraph 4 of the joint scheduling memorandum and does not need to be proved. The Defendant admits that he was not licensed for the period 2011 and 2012 when the subject matter of the commission payment arose.

Finally, contravention of the Act is an offence under section 97 of the Insurance Act Cap 230 laws of Uganda. Section 97 provides as follows:

"Offences and penalties.

(1) A person who carries on or is privy to the carrying on of any business under this Act, and a company established contrary to this Act commits an offence and is liable on conviction to a fine of not less than 2 million shillings and not more than 10 million shillings or to imprisonment for a term of not less than three months and not more than six months or to both the fine and imprisonment.

- (2) In addition to the punishment provided under subsection (1), a licence of a person convicted under that section shall be cancelled, and that person shall be disqualified from acquiring a licence for two years and thereafter shall not be issued a licence without the approval of the Minister.
- (3) A person who being a manager officer of the company licensed under this Act –
- a. failed to take any reasonable steps to secure compliance with the requirements of this Act;
  - b. make any statement or give any information which is false, in answer for information required under any provisions of this Act;
  - c. is privy to the furnishing of any false information under this Act, commits an offence and is liable on conviction to a fine of not less than 250,000 shillings and not more than 3 million shillings or to a term of imprisonment not exceeding two months or to both the fine and the imprisonment...."

The Defendant is not a company and cannot be liable under section 97 for the commission of an offence prescribed by that section. On the other hand section 37 of the Insurance Act puts the duty on the company namely the Plaintiff not to pay any commission or remuneration to any intermediary who is not licensed. On the other hand section 72 of the Insurance Act provides that no person shall carry out the business of an insurance or insurance broker or agent without a licence.

Both the Plaintiff and the Defendant from the facts agreed upon have contravened the provisions of the Insurance Act. The duty is on the Defendant to ensure that he carries out business as an insurance agent when he is duly licensed. On the other hand it is the duty of the Plaintiff as an insurance company not to pay out any commission to an agent or broker who is not a licensed person.

The cause of action of misrepresentation by the Defendant does not hold water because the onus is on the Plaintiff to ensure that it deals only with licensed persons. It cannot be based on the representation of the agent or broker but only diligence of the insurance company such as the Plaintiff to ensure that it deals with only licensed persons. Failure to do so is a breach of statute or duty placed on the insurance company by section 37 of the Insurance Act.

I have further considered clause 3.3 of the contract exhibit P2 which places the duty on the agent to obtain a licence. This duty in the contract only restates the law found under section 74 of the Insurance Act which provides that an application for a licence under section 72 and renewal of the licence shall be in the form prescribed by the commission. In other words the contract merely echoes the law and does not do away with the duty of the Plaintiff to ensure that it only pays a commission to a licensed person.

For purposes of completeness, I have considered the statutory provisions for applications by an agent for a licence under section 74. The application is made under the Insurance Regulations 2002, Statutory Instrument 66 - 2002. Particularly what is relevant is Regulation 6 (1) (b) which prescribes that an application for a licence or for its renewal under section 74 of the Act, and relating to insurance agent shall be in the form 4 of the Schedule to the regulations. The schedule clearly demonstrates that the application is made by the agent and is signed and declared to be true by the agent. I therefore do not endorse the submissions of the Defendant's Counsel that it was the duty of the Plaintiff to obtain this licence. Clause 3.3 of the contract between the parties as well as the Regulations imposes the duty on the Defendant to be a licensed agent at the time of carrying out any business of an insurance agent.

According to the case of **Bostel Brothers, Ltd versus Hurlock [1948] 2 All ER 312**, work was done under a licence in contravention of a statutory provision and the Plaintiff sued the Defendant for payment Somervell L.J held that the issue had been correctly stated in an earlier decision:

“The principle of law relied on was stated concisely and in a form appropriate to the present issue by Ellenborough CJ in *Langton v Hughes* (1 M & S 593, 596): ‘What is done in contravention of the provisions of an Act of Parliament, cannot be made the subject-matter of an action.’ We are concerned with a defence regulation which has the same force as an Act of Parliament. In *Brightman & Co v Tate*, the general subject-matter was similar to that in the present appeal. The Plaintiff, a builder, claimed for the balance of an account. There was a prohibition of the carrying on of building work above a certain cost without a licence. The Defendants asserted that as from a certain date the work done by the Plaintiff was outside the licence granted and was illegally performed. It was held that the work in respect of which the claim was made was outside the licence, and having regard to the terms of the Order was illegal, and the sum could not be recovered.”

There has to be a contravention of the provision of an Act of Parliament for the contract to be illegal. In **Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat [1987] 2 All ER 152** Kerr LJ held that it is settled among other holdings that:

“(i) Where a statute prohibits both parties from concluding or performing a contract when both or either of them have no authority to do so, the contract is impliedly prohibited: see *Mahmoud and Ispahani's case* [1921] 2 KB 716, [1921] All ER Rep 217 and its analysis by Pearce LJ in the *Archbalds case* [1961] 1 All ER 417, [1961] 1 QB 374 with which Devlin LJ agreed.”

From the above authorities, the Plaintiff was prohibited by section 37 of the Insurance Act from paying out a commission to an agent who is not licensed. On the other hand the Defendant was



prohibited from carrying out a business of an agent without a licence under section 72 of the Insurance Act. It follows that both parties did what was prohibited by statute. An action for refund of the payment is not enforceable in law neither can the Defendant claim a commission for a contract which is prohibited by statute. As I have held above the duty was on the Plaintiff to ensure that it only dealt with a licensed agent. The cause of action of misrepresentation by the Defendant cannot be maintained. It is purely a matter of law whether the Plaintiffs action can be maintained and the contract enforced by a court of law. In the case of **Mistry Amar Singh v Kulubya [1963] 3 All ER 499** judgment of the Privy Council Lord Morris of BORTH-Y-GEST summarised the several authorities which hold that a Plaintiff cannot rely on his own illegality to found a cause of action against the Defendant and the court will not aid the Plaintiff where he relies on his own illegality to sue the Defendant. Lord Morris of BORTH-Y-GEST said:

“In his judgment in *Scott v Brown, Doering, McNab & Co, Slaughter and May v Brown, Doering, McNab & Co* Lindley LJ ([1891–94] All ER Rep at p 657, [1892] 2 QB at p 728) thus expressed a well-established principle of law:

“Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality the court ought not to assist him.”

Lindley LJ added ([1891–94] All ER Rep at p 657, [1892] 2 QB at p 729): “Any rights which he may have irrespective of his illegal contract will, of course, be recognised and enforced”. A L Smith LJ ([1891–94] All ER Rep at p 660, [1892] 2 QB at p 734), said:

“If a Plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action.”

In the earlier case of *Taylor v Chester* it was said ((1869), LR 4 QB at p 314):

“The true test for determining whether or not the Plaintiff and the Defendant were in *pari delicto*, is by considering whether the Plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party.”

I have carefully read the principles applied by the Privy Council in **Mistry Amar Singh v Kulubya** (supra) and which I have reproduced above and I can conclude that the Plaintiff in this case cannot make its claim without first saying that it paid money out to an agent who was not licensed.

The cause of action could not be founded on misrepresentation of the defendant that he is an agent. The duty was on the plaintiff to establish whether he was. Having dealt with the Defendant for a number of years, the Plaintiff cannot move the court under a cause of action in misrepresentation. The Plaintiff ought to know.

The Plaintiff is forbidden by section 37 of the Insurance Act from paying a commission to an agent who is not licensed. He therefore relies on his own contravention of statute of paying money contrary to the Act to seek refunds and declarations.

In the premises the action cannot succeed without the court endorsing the Plaintiff's act of paying the commission contrary to section 37 of the statute. The suit in the premises cannot be maintained and is accordingly dismissed with no order as to costs.

Judgement delivered in open court on the 16<sup>th</sup> of December 2016

**Christopher Madrama Izama**

**Judge**

**Judgment** delivered in the presence of:

Counsel Emoru Emmanuel Counsel for the Plaintiff

Defendants Counsel is absent though the daughter of Defendant Ms Kiruusa Tharua is present in court.

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**16<sup>th</sup> December 2016**