

REPUBLIC OF KENYA
INSURANCE APPEALS TRIBUNAL
APPEAL NO. 1 OF 2019

BETWEEN

AAR INSURANCE KENYA LIMITED.....APPELLANT

-VS-

INSURANCE REGULATORY AUTHORITY.....RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

The Appellant lodged this appeal on 22nd February 2019 against the decision of the Commissioner of Insurance that was erroneously dated 22nd January 2018 but actually delivered on 22nd January 2019. The Appellant outlines only one ground of appeal, which is:

- 1) THAT the Commissioner erred in law and fact by engaging in consideration of issues which are pending for hearing and determination before other Courts of competent jurisdiction.

Briefly, the statement of facts of the Appellant are that the decision of the Commissioner of Insurance was erroneously delivered as it relates to a commission from Kakamega County WIBA and GPA Insurance business. One Mr. Philip Luteya, who was not a party to these proceedings, lodged a complaint before the Kakamega DCI with respect to the business relating to the Kakamega County Assembly WIBA and Group Personal Accident (GPA) Insurance involving the Appellant. Summons were issued by the Kakamega DCI. It is the case of the Appellant that the complaint, validity of the summons and its enforceability is pending determination before the Chief Magistrate's Court in **Kakamega Misc. Criminal Application No. 115 of 2018**. The matter is yet to be concluded. Further, the aforesaid Mr. Philip Luteya filed a civil suit before the High Court of Kenya in **Kakamega namely HCCC Civil Suit No. 12 of 2017** against the Appellant seeking the following orders:

- a) Kenya Shillings Seven Million, Four Hundred Ninety Five Thousand Three Hundred Twenty Four (Kshs 7,495,324/=) only
- b) Costs of this suit
- c) Interest

In this civil suit, Mr. Philip Luteya and the Appellant's representative testified in court on 25th June 2018 and thereafter, both parties closed their case. However, the Plaintiff, Mr. Luteya, proceeded to file an application dated 10th July 2018 seeking to re-open the case and call witnesses and produce documents. On 29th April 2019, the Hon. Justice W. Musyoka delivered the ruling in Mr. Luteya's application in the following terms:

- a) That the matter shall be re-opened for re-hearing but such re-hearing shall be limited to production of the documents that the Plaintiff intends to rely on;
- b) That the Plaintiff shall be subjected to cross-examination, limited to the documents that he shall have produced;
- c) That the Plaintiff shall pay to the Defendant throw away costs of Kshs 10,000.00 within fourteen (14) days, in default of which the orders made herein shall abate; and
- d) That the dates of the re-hearing shall be given by the court at the delivery of this ruling.

It is important to note that in the course of the civil proceedings before the High Court of Kenya at Kakamega, Mr. Luteya lodged his complaint against the Appellant to the Commissioner of Insurance on 27th July 2018. Mr. Luteya, however, did not disclose to the Respondent the existence of the pending suit at the time of lodging the aforesaid complaint. His civil suit before the High Court of Kenya sitting in Kakamega related to the non-payment of Commission to him by the Appellant for his role in placement of Kakamega County Assembly WIBA and GPA insurance business which was instead allegedly paid to one Mr. Eric Ouma Odhiambo (not a party to these proceedings) who was, at the time i.e. 2016, not a duly licensed insurance agent.

Mr. Luteya lodged his complaint with the Commissioner dated 27th July 2018 and filed on 22nd August 2018. The complaint by Mr. Luteya related to the unlicensed agent Eric Ouma Odhiambo. He requested the office of the Commissioner to investigate and confirm that Eric Ouma Odhiambo is not licensed to transact insurance business and action be taken against him. It is worth noting that Mr. Philip Luteya did not seek a finding for payment of commission in his complaint lodged with the Commissioner.

Following the lodging of the complaint, the Respondent proceeded to subject the same to an internal complaint resolution procedure. The Respondent reviewed the documents provided by the Appellant on one part and Mr. Luteya on the other part. The Respondent's Technical Division conducted an inspection of the Appellant company as provided under the law and issued a report with recommendations to the Commissioner of Insurance. The Commissioner then proceeded to make the following decision with respect to the Appellant:

- a) Pay a penalty of Kenya Shillings Two Hundred Thousand (Kshs 200,000) for contravening the provisions of Section 67D of the Insurance Act by dealing with an unauthorized agent.
- b) Pay full Commission to Philip Luteya for his role in the placement of Kakamega County Assembly WIBA and GPA business and submit evidence of payment to his office;
- c) Recover commission paid to Eric Ouma Odhiambo in its entirety.

Vide a letter dated 7th February 2019, the Appellant requested the Commissioner of Insurance to review and nullify his findings due to the abuse of judicial process by Mr. Luteya and his supposedly attempt to subvert court action for the arrival of a fair decision. The Commissioner of Insurance declined to review the aforesaid decision leading to the filing of the present appeal by the Appellant.

B. THE HEARING OF THE PRESENT APPEAL

The matter herein came up for directions on 8th August 2019 during which date the parties agreed to file written submissions and file any other supplementary list of documents that they would be relying on during the hearing of the matter. An interlocutory Application dated 20th February 2019 and filed by the Appellant on 22nd February 2019 was disposed of by consent whereby parties agreed to maintain status quo pending hearing and determination of the Appeal.

The parties opted not to call any witnesses but to dispose of the matter vide the written statement of facts of the Appellant's representative i.e. the Chief Executive Officer of the Appellant one Mr. Nixon Shigoli and the Respondent's representative i.e. the Commissioner of Insurance, Mr. Godfrey Kiptum.

The matter herein was heard on 17th September 2019 during which date the parties argued their respective cases. In the course of the hearing, upon questions being put forth to Counsel for the Appellant, he requested for a short break in order to consult with his client. After a short while, Counsel for the Appellant came back with a gentleman whom he introduced as Mr. Nixon Shigoli, the Managing Director of the Appellant. The Tribunal welcomed Mr. Nixon Shigoli and it was asked by Counsel of the Appellant to pose the questions to him as he was best placed to answer the same. Mr. Shigoli said that he was present to assist the Tribunal and was not being called as a witness.

C. THE APPELLANT'S SUBMISSIONS AND REPRESENTATIONS

Mr. Abok, Counsel for the Appellant, submitted that the decision of the Commissioner of Insurance wrongly dated 22nd January 2018 was directly related to the matter pending in Kakamega High Court filed by Mr. Philip Luteya. He submitted that by ordering the Appellant to pay Mr. Philip Luteya the commission in relation to the earlier stated insurance business, the Respondent was entering into the purview of the High Court that was still pending determination in the civil suit. Learned Counsel for the Appellant submitted that vide letter dated 27th July 2018, the Commissioner of Insurance was duly informed of the pending suit. In his submissions, Learned Counsel for the Appellant admitted that the issue before the Commissioner of Insurance related to Mr. Eric Ouma Odhiambo who had transacted insurance business without a valid license from the Regulator. On the issue of Mr. Eric Ouma Odhiambo being unlicensed, Counsel admitted that it was not an issue before the High Court of Kenya or any other court of competent jurisdiction. The ground of appeal to which Counsel for the Appellant had presented to the Tribunal in its Memorandum of Appeal dated 20th February 2019 was a single one i.e.

- 1) That the Commissioner erred in law and fact by engaging in consideration of issues which are pending for hearing and determination before other Courts of competent jurisdiction.

In his submissions, Counsel for the Appellant conceded that the licensing status of an insurance agent was not in issue in any court of competent jurisdiction as earlier stated. Learned Counsel further stated that the Commissioner's decision will affect the outcome of the case in the High Court that has since been re-opened. He argued that

the Commissioner's decision rests the Kakamega High Court matter as the Appellant was directed to pay the complainant the commission which matter was and is still awaiting determination in court.

Mr. Abok argued that Mr. Eric Ouma Odhiambo was a registered insurance broker duly licensed to transact insurance business. He further stated that the Insurance Act requires that any person who transacts insurance business must be licensed. There was however no document annexed in the Appellant's Record of Appeal of a licence issued by the Regulator to Mr. Eric Ouma Odhiambo during the period when the Kakamega County Assembly WIBA and GPA insurance business was transacted.

Counsel for the Appellant submitted that should the Tribunal dismiss the Appeal, its image would be tainted as its decision would be in contravention to Articles 47 and 50 of the Constitution of Kenya on fair administrative action and fair hearing respectively. He argued that at any moment, an individual can only choose one forum for the resolution of an impending dispute. Counsel submitted that Mr. Philip Luteya ought, therefore, to have waited for the conclusion of the High Court matter.

Mr. Nixon Shigoli, the Appellant's Managing Director, in his representations made to the Tribunal begrudgingly admitted that indeed Mr. Eric Ouma Odhiambo was unlicensed by the Regulator. Secondly, he conceded that the Appellant did not have a problem with the first limb of the Commissioner's decision that is paying the penalty of Kshs 200,000/= for contravening the provisions of section 67D of the Insurance Act by dealing with an unlicensed agent. Mr. Nixon Shigoli only had an issue with the Appellant having to pay full commission to Mr. Philip Luteya for his role in the placement of Kakamega County Assembly WIBA and GPA Insurance business. The reason for this was that such decision was made by the Commissioner while the High Court matter was still pending.

D. THE RESPONDENT'S SUBMISSIONS AND REPRESENTATIONS

Counsel for the Respondent argued that the Commissioner for Insurance exercised his statutory power in addressing the complaint lodged by Mr. Philip Luteya of Luteya Insurance Agency. Accordingly, this statutory mandate cannot be interfered with. In fact, he submitted that the courts have protected the statutory functions of state institutions unless fundamental rights have been breached. The Respondent relied on the case of **HCCC Mombasa Petition No. 15 of 2017 Hassan Ali Joho –vs- Inspector**

General of Police and 3 Others. Counsel submitted that the presence of a case in court does not extinguish the rights of the Commissioner from exercising its statutory mandate.

He argued that once the complaint was lodged, it was subjected to the usual internal complaint resolution mechanism. In pursuance to sections 67A and 67B of the Insurance Act, Cap 487 of the Laws of Kenya, the Commissioner ordered that an inspection of the Appellant be undertaken. During the inspection, the Commissioner provided the Appellant with an opportunity to be heard, engaged and informed of the matters that arose in the inspection report.

Mr. Odero, learned counsel for the Respondent, further asserted that the principle of *res subjudice* does not apply in this context as the Commissioner's decision was based on exercise of a statutory mandate. The Commissioner was never a party in the court proceedings in Kakamega and hence remained at liberty to take action in the matter.

It was the submission of the Respondent that nothing would stop Mr. Philip Luteya from seeking redress from different fora. That said, the Appellant also never sought redress in the very court where the matter is being contested.

E. ISSUES FOR DETERMINATION

The parties herein did not file a list of agreed issues for determination by the Tribunal. The following have therefore been deduced by the Tribunal as issues arising for determination:

1. Whether the doctrine of *res subjudice* applies with respect to the **Kakamega HCCC Civil Suit No. 12 of 2017 Philip Luteya –vs- AAR Insurance Company Limited** and the complaint before the Commissioner of Insurance
2. Whether the decision of the Commissioner of Insurance was proper within the context of sections 67, 67A, 67B, and 173, Insurance Act, Cap 487 of the Laws of Kenya.
3. Whether the Appellant fully complied with section 67D of the Insurance Act Cap 487 of the Laws of Kenya
4. Whether the Respondent had powers to deal with the complaint presented to it by Mr. Luteya against the Appellant as the Respondent did

F. DISCUSSION

The Appellant's sole ground of appeal in this matter is:

- 1) THAT the Commissioner erred in law and fact by engaging in consideration of issues which are pending for hearing and determination before other Courts of competent jurisdiction.

The doctrine of *res subjudice* has been provided for in the Civil Procedure Act, Cap 21 of the Laws of Kenya. Section 6 of the Civil Procedure Act states as follows:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

From this provision, all the following elements must be fulfilled for a matter to be said to be *subjudice*:

- a) Same parties
- b) The same issues are directly and substantially in issue
- c) Parties litigating under the same title
- d) Both matters pending in courts of similar jurisdiction

In the case of **Republic –vs- Registrar of Societies Kenya and 2 Others Ex-parte Moses Kirima and 2 Others (2017) eKLR** the court held that:

".... Therefore for the principle to apply certain conditions precedent must be shown to exist. First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between the parties under whom they or any of them claim, litigating under the same title; and such suit or proceedings must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed..."

It is to be noted that the parties before the Commissioner of Insurance were Mr. Luteya on the one hand and the Appellant herein on the other hand. However, we are satisfied that the issues for determination before the Commissioner, on the one hand and before the High Court in Kakamega, on the other hand are not directly and substantially the same. In the complaint before the Respondent, Mr. Luteya's complaint related to the Appellant dealing with an unlicensed person. He required the Commissioner to investigate and confirm that indeed Mr. Eric Ouma Odhiambo is not licensed to transact insurance business in Kenya. Secondly, that action be taken against Mr. Eric Ouma Odhiambo for misleading the public.

On the other hand, the High Court civil matter related to payment of Kshs 7,495,324/= plus costs and interest. Further, the matter before the Respondent was not before a court of law. Consequently, the principle of *res subjudice* does not apply. There was no court order in the High Court matter restraining the Respondent from dealing with the complaint more so given that the Appellant was fully aware of the existence of the court matter. At no point did the Appellant raise the objection of the pending civil suit. It was only until when the decision was made by the Respondent that the Appellant requested for a review of the Commissioner's decision on the basis of the pending court matter. As stated earlier, the Commissioner declined to review the decision. At this point, the Tribunal notes that the Appellant's appeal is not against the Commissioner's refusal to review its decision of 22nd January 2019 but is an appeal of the original decision itself. If the Tribunal were to strictly follow rules of Civil Procedure, then this Appeal would face competency questions. The Tribunal, however, will proceed to determine the Appeal on its merits, the question of competency aside. Similarly, the Respondent did not raise the question of the competency of the Appeal.

The CEO of the Appellant, Mr. Nixon Shigoli, was asked by the Tribunal whether Mr. Eric Ouma Odhiambo was a licensed agent at the time of transacting insurance business. After some initial prevarication, Mr. Nixon Shigoli admitted that Mr. Eric Ouma Odhiambo was indeed not a licensed agent. This further explains why Mr. Nixon Shigoli said the Appellant was not contesting the first limb of the Commissioner's decision. Section 2 of the Insurance Act defines an agent as "*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 a broker.*"

It is clear from the documents that were presented before this Tribunal that the agreement for the Kakamega County Assembly WIBA and GPA Insurance was entered into on 30th December 2016. At that time, Mr. Eric Ouma Odhiambo was not a licensed agent as provided under section 67 of the Insurance Act. The Tribunal finds that as a matter of insurance practice, the Respondent allows agents to be issued with provisional licenses by the Association of Kenya Insurers. After the provisional period, the Respondent would then issue the full licence to the agent. The Tribunal finds that the practice which has been acquiesced to by the Respondent is in total contravention of the law and hence it should be stopped with immediate effect. The Insurance Act only confers the power of licensing of agents to the Respondent and not the Association of Kenya Insurers. This mandate cannot be delegated since the Insurance Act does not allow for such delegation.

That notwithstanding, the Record of Appeal included a provisional agent's licence of Mr. Eric Ouma Odhiambo for the period of 16th March 2017 to 16th March 2018. Consequently, with the agreement having been entered into way earlier, the Appellant did flout the law by dealing in insurance business with an unlicensed person. The CEO of the Appellant mentioned that the payment of the commission was what could be termed as transacting in insurance business. According to him, the payment of the commission was made during the period when Mr. Eric Ouma Odhiambo was already a licensed agent. The Tribunal differs with such position.

According to "Insuranceopedia", the term "**transacting insurance business**" refers to *"the activities and practices related to putting into effect an insurance contract, and it includes activities such as solicitation and offer of services, submission of a proposal, and undertaking preliminary and continuing discussions and negotiations to convince another person to agree and accept the contract offer"*.

In addition, Section 2 of the Insurance Act defines insurance business as:

"...business of undertaking liability by way of insurance (including reinsurance) in respect of any loss of life and personal injury and any loss or damage, including liability to pay damage or compensation, contingent upon the happening of a specified event..."

Consequently, the payment of the commission is only one aspect in the chain of activities described as transacting insurance business. Since the engagement of Mr. Eric Ouma Odhiambo was done throughout this period including the payment of commission, the Appellant transacted in insurance business with an unlicensed person.

Section 67D(2) of the Insurance Act on its part states as follows:

“Without prejudice to the provisions of this Part, a person who, upon inspection, is found to be:-

- (a) Transacting insurance business without registration, renewal of registration or authorization, under this Act or with persons not so registered or authorized; or*
- (b) Charging a rate of premium other than that filed with the Commissioner under section 75.*

- (c) Committing any other business malpractices,*

Shall, in addition to any other penalty prescribed under this Act, be liable to pay a penalty of two hundred thousand shillings, which shall be paid to the Policy Holders' Compensation Fund in such manner as may, from time to time, be prescribed by the Authority.”

Taking all the above matters into consideration, the Tribunal finds and holds that there was no commission, as known to law, paid to Mr. Eric Ouma Odhiambo since the said person was unlicensed and therefore cannot legally receive an insurance commission apart from being unable to transact insurance business. In the same vein, the Tribunal observes that an unlicensed insurer has no legal right to receive a legal premium from the insuring public. Therefore, the monies that were paid by the Appellant to Mr. Eric Ouma Odhiambo were not a commission, as known to law.

Taking into account the fact that the CEO of the Appellant conceded to the decision of the Commissioner with respect to payment of the penalty for Kshs 200,000/= for engaging an unlicensed person, the Tribunal upholds the said decision to penalize the Appellant for engaging an unlicensed agent in insurance business.

On the other hand, after finding that the Appellant dealt with an unlicensed person, the Commissioner went ahead to decide that the commission paid to the unlicensed person be recovered and paid to Mr. Philip Luteya. It is this aspect of the decision that raised objections from the Appellant who argued that the same determines the civil suit before the High Court.

While section 67D of the Insurance Act provides for the penalty, the law is silent on whether the Commissioner can proceed to make a directive relating to commission payable. It is the Tribunal's finding that Mr. Philip Luteya never raised the issue of payment of commission to him in his complaint to the Commissioner. He only sought investigation and action to be taken against Mr. Eric Ouma Odhiambo on whether he is licensed or not. A prayer that was not pleaded cannot then have been granted by the Commissioner.

The Tribunal relies on the case of **Nrb Civil Appeal No. 97 of 2018 Caltex Oil Kenya Limited -vs- Rono Limited (2018) eKLR** in which the court said:

“Pleadings are a shield and a sword for both sides. They have the potential of informing each party what they expect in the trial before the court. If the party wishes the court to determine or grant a prayer, it must be specifically pleaded and proved. Pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders.”

We are therefore persuaded that the award of the commission to Mr. Philip Luteya cannot be upheld since it was not prayed for. Further as the Tribunal has held hereinabove, we find that no legal commission has been paid to Mr. Eric Ouma Odhiambo since he is unlicensed and he has no capacity to receive any such commission being an unlicensed person.

Therefore, the decision of the Respondent ordering the Appellant to recover the commission from Mr. Eric Ouma Odhiambo cannot therefore stand on account of the matters explained above.

G. CONCLUSION

Having considered all the above matters, the Tribunal makes the following findings with respect to the issues earlier identified.

1. Whether the doctrine of *res subjudice* applies with respect to the Kakamega HCCC Civil Suit No. 12 of 2017 Philip Luteya –vs- AAR Insurance Company Limited and the complaint before the Commissioner of Insurance

The Tribunal finds that the doctrine of *res subjudice* does not apply with respect to the two matters since they have different subject matters. We note that this was expressly conceded by the Appellant's Counsel.

2. Whether the decision of the Commissioner of Insurance was proper within the context of sections 67, 67A, 67B, 173, Insurance Act, Cap 487 of the Laws of Kenya.

The Tribunal finds that indeed the decision of the Commissioner was proper in the context of the stated Sections except in the context of the Respondent ordering the Appellant to recover commission paid to Mr. Eric Ouma Odhiambo and also payment of the recovered commission to Mr. Philp Luteya.

3. Whether the Appellant fully complied with section 67D of the Insurance Act Cap 487 of the Laws of Kenya

The Tribunal finds that the Appellant did not comply with section 67D of the Insurance Act, Cap 487 by transacting with an unlicensed agent and as such the Tribunal upholds the Commissioner's decision to penalize the Appellant. The Tribunal takes into account the Appellant's concession on this score.

4. Whether the Respondent had powers to deal with the complaint presented to it by Mr. Luteya against the Appellant as the Respondent did

The Tribunal finds that indeed in its role as the insurance sector Regulator, the Respondent had the power to deal with the complaint as presented. More so the Regulator is the custodian of the register of all persons authorized to deal with insurance business and to see to it that no unauthorized person deals with insurance business as provided by law.

H. FINAL ORDERS

In conclusion, the Tribunal makes the following orders:-

1. The Tribunal upholds the decision of the Respondent to penalize the Appellant Kshs 200,000/= for engaging an unlicensed agent to transact insurance business and further orders that the same be paid by the Appellant forthwith.
2. The Tribunal revokes the Respondent's decision ordering recovery of commission by the Appellant from Mr. Eric Ouma Odhiambo and payment of full commission to Mr. Philip Luteya.
3. The Tribunal varies the decision of the Respondent by ordering that the Appellant deposits the commission payable on account of the Kakamega County Assembly WIBA and GPA Insurance with the Respondent within thirty (30) days and the said commission to be held in an interest bearing account by the Respondent pending determination of **Kakamega HCCC Civil Suit No. 12 of 2017 Philip Luteya –vs- AAR Insurance Company Limited.**
4. Upon determination of **Kakamega HCCC Civil Suit No. 12 of 2017 Philip Luteya –vs- AAR Insurance Company Limited.**, the Respondent be at liberty to pay the held commission to the rightful person together with interest accrued thereon.

5. Should the Appellant fail to pay the penalty and/or the commission payable within the stipulated time frames, the Respondent be and is at liberty to take any such administrative action as provided by law on the Appellant.

6. Given that the Tribunal has upheld one part of the Respondent's decision and has revoked and varied another part of the Respondent's decision, the Tribunal orders that each party to bear its own costs for the present Appeal.

We wish to commend Counsel for the Appellant and the Respondent for putting together the record of appeal, statements of fact, written submissions and supporting authorities to enable the Insurance Appeals Tribunal to sit and conclusively determine the matter within the shortest period.

DATED and DELIVERED at NAIROBI the 7th day of October 2019.



Hon. Mr. Wambua Kilonzo

Chairperson, Insurance Appeals Tribunal




Hon. Dr. Annette Mbogoh

Vice Chairperson, Insurance Appeals Tribunal



Hon. Mr. Martin Mugambi Mithega

Member, Insurance Appeals Tribunal



Hon. Mr. Thomas Koyier

Member, Insurance Appeals Tribunal

Hon. Mr. Charles Kipkulei

Member, Insurance Appeals Tribunal



Hon. Ms. Monica Mucheke

Member, Insurance Appeals Tribunal



