



REPUBLIC OF KENYA



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ICEA Lion General Insurance Company Limited v Adrian & Associates Limited (Commercial Appeal E084 of 2022) [2023] KEHC 22541 (KLR) (Commercial and Tax) (26 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22541 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E084 OF 2022
DAS MAJANJA, J
SEPTEMBER 26, 2023

BETWEEN

ICEA LION GENERAL INSURANCE COMPANY LIMITED APPELLANT

AND

ADRIAN & ASSOCIATES LIMITED RESPONDENT

(Being an appeal from the Judgment of Hon. D.M. Kivuti, PM dated 21st June 2022 at the Magistrates Court at Nairobi, in Civil Case No.5984 of 2014)

JUDGMENT

Introduction and Background

1. On October 7, 2014, the Respondent filed suit in the Subordinate Court claiming Kshs 3,406,679.00 from the Appellant on account of commissions due to it as an insurance broker for the Appellant. The Appellant denied the claim. It also stated that suit was time barred since the Respondent's account with it was closed in 2007. The Appellant also averred that it had been sued wrongly as the Respondent transacted with a different and separate legal entity known as the Insurance Company of East Africa Limited.
2. At the hearing, the parties called and relied on their witnesses and bundles of documents. After considering the same, the Subordinate Court rendered its judgment on June 21, 2022. The court found that there was a merger between the Appellant and Insurance Company of East Africa Limited and that the Respondent's claim was part of the merger event and that the Appellant could not use the process to disentitle the Respondent of its claim and escape liability. The Subordinate Court further found that the parties had a business engagement with the Respondent as an insurance broker where it



would place insurance business with customers and in return the Appellant would pay a commission based on the premiums delivered by the Respondent.

3. The Subordinate Court found that the Appellant did not rebut the statement of account on record produced by the Respondent which showed that the Respondent procured premiums worth Kshs 11,337,910.00 which entitled it to Kshs 1,238,299.00 as commission. That there was a meeting on 06.12.2011 where the Respondent claimed credit to it. The Subordinate Court held that since the amounts claimed by the Respondent were not disputed by contrary evidence, the Respondent succeeded in its claim for Kshs 2,332,784.00 which it awarded together with costs and interest calculated from the date of judgment.
4. This aforesaid decision now forms the subject of this appeal which is grounded in its Memorandum of Appeal dated June 30, 2022. The appeal has been canvassed by way of written submissions to which I shall make relevant references in my analysis and determination below.

Analysis and Determination

5. In determining this appeal, I am aware that this court is exercising the jurisdiction of a first appellate court which has a duty to examine matters of law and fact and subject the whole evidence to a fresh and exhaustive scrutiny, drawing conclusions from that analysis but always bearing in mind that it did not have an opportunity to hear the witnesses first hand (*Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123).
6. The Appellant has condensed the 18 grounds of appeal in its Memorandum of Appeal to three grounds. That the Subordinate Court erred in holding that the Respondent had proved its case against the Appellant to the required standard. That it erred in failing to find that the Respondent's case was filed after statutory limitation had set in and that it erred in finding without basis that the Respondent was entitled to Kshs 1,238,299.00 but then proceeded to award Kshs 2,322,784.00.
7. The Appellant faults the Subordinate Court for not finding that the Respondent had sued the wrong entity. That the Respondent had resolved in its resolution of September 17, 2014 to sue ICEA Lion Life Assurance Company Limited, however, it sued ICEA Lion General Insurance Company Limited and that the court erred by entering judgment against an entity not party to the suit. Further, that the Subordinate Court failed to appreciate the issue of the merger between the entities.
8. I am unable to agree with the Appellant on the ground that it was wrongly sued for several reasons. First, even though the Respondent resolved in its resolution to sue ICEA Lion Life Assurance Company Limited but instead sued ICEA Lion General Insurance Company Limited, there was no doubt that these two entities were one and the same as there was a merger between Insurance Company of East Africa Limited and Lion General Insurance Company Limited. Thus, whether the Respondent sued ICEA Lion Life Assurance Company Limited or ICEA Lion General Insurance Company Limited did not defeat its claim against the Appellant as the Appellant always knew that the two entities were one and the same. This was nothing but a misdescription of the parties that was not fatal to the Respondent's case particularly since the issue of the Respondent's liability was provided for in the merger documents (see *Fubeco China Fushun v Naiposha Company Limited and 11 Others* [2014] eKLR and *EMK Advocates v Rhombus Construction Company Limited* [2021] eKLR)
9. Second, I find that the Appellant was approbating and reprobating on this issue. On one hand it acknowledges that the parties were in a business relationship and that the Respondent was always dealing with it, only for it to change tact and state that the Respondent is a stranger to it as it apparently dealt with another entity. The material on record is overwhelming that the parties had been dealing with each other. Third, I find that indeed the Subordinate Court considered the issue of the merger,



contrary to the Appellant's submissions and rightly found that the Appellant could not use the same to escape liability. This ground by the Appellant therefore fails.

10. The next issue for consideration is whether the Subordinate Court failed to find that the Respondent's suit had been caught up by the statute of limitations. The Appellant submits that the Respondent's claim was based on contractual obligations between 2005 and 2007 and as such, the last day of filing the suit was May 4, 2013. I do not agree with the Appellant on this ground. Whereas section 4(1)(a) of the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya) provides that an action founded on contract may not be brought after 6 years from the date from which the cause of action accrued, section 23(3) of the same Act goes on to state that this right of action accrues when,

‘.....the person liable to or accountable therefore acknowledges the claim or makes any payment in respect of it and ‘the right accrues on and not before the date of the acknowledgement or the last payment.’

I agree with the Respondent's submissions that even though the Appellant closed its account with the Respondent in 2008, the Appellant only acknowledged the claim through its letter of April 26, 2012 where it stated that it was willing to make payment on valid obligations by the Respondent. There were also intervening events between then including the fact that in the parties' meeting of 06.12.2011 they were still undertaking reconciliation of the Respondent's outstanding amounts. Time therefore froze as this reconciliation was being undertaken (see *Bhupinder Singh Dogra v Coast Development Authority* MSA HCCC No. 158 of 2003 [2021] eKLR). It is for these reasons that I find that the suit was not statute barred as it was filed within 6 years from the date in which the cause of action arose which was on April 26, 2012 whereas the suit was filed just over two years later on October 7, 2014.

11. The last ground is that the Subordinate Court erred in finding that the Respondent was entitled to Kshs 1,238,299.00 but then proceed to award Kshs 2,322,784.00. Indeed, and as has been stated above, the trial magistrate held that it was not controverted that the Respondent procured premium amounting to Kshs 11,337,910.00 which entitled it to Kshs 1,238,299.00 in commissions. However, the trial court held that since the Appellant did not provide contrary evidence, the Respondent had succeeded in its claim of Kshs 2,322,784.00. On its part, the Respondent submits that the Appellant's witness testified that the Respondent had placed Kshs 13,337,907.00 in premiums and that the net commission according to his evidence was said to be Kshs 1,535,251.00. The Respondent admitted that its tabulation and calculation was inaccurate as the sum of Kshs 1,238,299.00 which it demanded was based on business transacted amounting to Kshs 11,337,910.00.
12. I agree with the Appellant that there was no basis for the Subordinate Court to award Kshs 2,322,784.00 when it had already found that the Respondent was entitled to only Kshs 1,238,299.00. The sums claimed by the Respondent were in the nature of special damages and thus, even though there was no contrary evidence by the Appellant, the onus remained on the Respondent to prove the said claim of Kshs 2,322,784.00 affirmatively and with particularity (see *Hahn v Singh* [1985] KLR 716, *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd* NRB CA Civil Appeal No. 154 of 1992 (UR)).
13. The Respondent only managed to prove the sum of Kshs 1,238,299.00 out of the claimed Kshs 2,322,784.00. This is what it was entitled to and no more. The Subordinate Court therefore fell into error when it awarded the Respondent Kshs 2,322,784.00.



Disposition

14. The Appellant's appeal partly succeeds and is allowed to the extent only that the decision of the Subordinate Court dated June 21, 2022 awarding the Respondent Kshs 2,332,784.00 be and is hereby set aside and substituted with an award of Kshs 1,238,299.00.
15. The Respondent shall bear the costs of this appeal assessed at Kshs 45,000,00 only.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Mahugu instructed by Wangai Nyuthe and Company Advocates for the Appellant.

Mr Ombete instructed by L. M. Ombete and Company Advocates for the Respondent.

