IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

COMM CASE NO. E214 OF 2021

BETWEEN

MONARCH INSURANCE COMPANY LIMITED.....PLAINTIFF

AND

DISNEY INSURANCE BROKERS LIMITED.....DEFENDANT

RULING

1. The application for consideration by the court is the Plaintiff's Notice of Motion dated 15th April 2021 made under **Order 13 rule 2** of the ***Civil Procedure Rules*** ("the ***Rules***") seeking judgment on admission as prayed for in the Plaint. It is supported by the affidavit and further affidavits of Hellen Muchira, the Plaintiff's Credit Controller, sworn on 15th April 2021 and 29th June 2021 respectively. The Defendant opposes the application through the replying affidavit of its Managing Director, Charles Kanyi, sworn on 16th June 2021.

2. The parties' advocates made brief oral submissions in support of their respective positions which are outlined in the respective pleadings and depositions. In order to deal with the matter in issue let me outline the cause of action and defence as set out in the pleadings.

3. The Plaintiff is an insurance company licensed to carry on insurance business under the ***Insurance Act (Chapter 487 of the Laws of Kenya)*** while the Defendant carries on business of insurance brokerage which involves selling insurance policies to members of the public on behalf of the insurer. According to the Plaintiff, the Defendant has been selling its policies to the public in consideration for a commission at a rate prescribed under the ***Insurance Act*** and ***Insurance Regulations***.

4. The Plaintiff's claim against the Defendant as set out in the Plaint dated 15th April 2021 is for KES. 58,392,647.00, interest and costs being outstanding premiums which the Defendant failed to remit between 2014 and 2020. The Plaintiff stated that in the course of 2019 – 2020, the parties had several discussions with a view to reaching a settlement whereupon the Defendant issued postdated cheques for an aggregate amount of KES 2,122,807.00 which it recalled by email. In addition, the Plaintiff states that the Defendant proposed to pay the outstanding debt by a letter dated 10th December 2019 and acknowledged its indebtedness by the letter dated 8th September 2020. That it also proposed to clear the debt in its letter dated 16th October 2020. The Plaintiff avers that despite demand and notice of intention to sue, the Defendant has failed to pay the debt leading to the filing of the suit.

5. The Defendant in its Statement of Defence dated 11th June 2021 denies that it is indebted to the Plaintiff as alleged. It states that it would sell premium policies on behalf of the Plaintiff and remit premiums within 60 days of assumption of risk by the Plaintiff less its commission on condition that the Defendant duly received payment of premiums from its customers. It avers that the claim for unremitted premiums from 2014 is statute barred by dint of **section 4** of the ***Limitation of Actions Act (Chapter 22 of the Laws of Kenya)***. As regard the admissions alleged by the Plaintiff, the Defendant states that the correspondence between it and the Plaintiff do not amount to admissions. It adds that it entered into negotiations with the Plaintiff in a bid to reconcile accounts and in order to confirm whether there were outstanding premiums that were paid but unremitted.

6. I now turn to the application for judgment on admission. **Order 13 Rule 2** of the ***Rules*** which deals with judgment on admission provides as follows:

> *Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just.* [emphasis mine]

7. The jurisprudence relating to applications made for judgment on admission is set out in the case of ***Choitram v Nazari*** **[1984] KLR 327** where Madan, JA expresses the view that:

> *For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning*

In the same case, Chesoni Ag. JA, observed that:

> *Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words "otherwise" which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions ……. It is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially.*

8. In ***Maseno University v Bubble Engineering Company Limited*** **KSM CA Civil Appeal No. 29 of 2007 [2019] eKLR**, the Court of Appeal cited with approval its decision in ***Agricultural Finance Corporation v Kenya National Assurance Company Ltd NRB*** **CA Civil Appeal No. 271 of 1996 (UR)** that:

> *Final judgment ought not be passed on admissions unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right rather it is a matter of discretion of the court and where the defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion.*

9. It is worth noting that in its deposition in support of the application, the Plaintiff filed documents to support its case. The Defendant did not contest the authenticity of these documents but asserted that they do not amount to an admission of the debt as contended by the Plaintiff.

10. In a series of emails dated 15th October 2019, 29th October 2019,14th November 2019 and 28th November 2019, the Defendant requested to Plaintiff no to bank cheques it had issued to the Plaintiff. In its Defence and in response, the Defendant denies that these cheques were intended to resolve the outstanding debt and avers that they were payment of premiums in the ordinary cause of business. After the last email, the Plaintiff wrote to the Defendant the demand letter dated 29th November 2019 referenced, *"STATEMENT OF ACCOUNT & OVERDUE PREMIUMS ON YOU'RE A/C – KES 61,754,049.72''* In its response dated 10th December 2019, the Defendant stated in part, *"We regret the inconvenience cause by the unbanked cheques and appreciate your patience on the same…."* This letter confirms that the unbanked cheques were intended for settlement of the outstanding debt. In the same letter, the Plaintiff stated that it was planning to settle part of the debt by paying KES. 1,000,000.00 every month commencing 22nd January 2020. I hold that this clear evidence that the Defendant was indebted to the Plaintiff.

11. The Defendant has raised the issue of reconciling accounts and in particular it argues that the Plaintiff is claiming two different figures in the correspondence and in the Plaint. In the letter dated 10th December 2019, the Defendant raised the issue of reconciliation of accounts. It followed this up by an email dated 3rd June 2020 to the Plaintiff stating that, *"We are in the process of reconciling our accounts and were require a statement of account with all transactions including 0 balances to date in Excel''*. The Plaintiff obliged to the request by sending the statement of account on the same day which the Defendant acknowledged receipt. The statement shows that the outstanding amount is KES 58,842,511.72.

12. The Plaintiff did not receive an immediate response causing the Plaintiff to issue a demand dated 25th August 2020. The Defendant responded by its letter dated 18th September 2020 acknowledging that its account was in arrears but stated that it was still in the process of reconciling the accounts. It also requested time to clear the outstanding debt. By the letter dated 16th October 2020 which followed a meeting, the Defendant stated that it intended to pay KES 9,000,000.00 commencing 21st November 2020 so as to clear part of the debt.

13. The issue as I understand, is whether the admissions made by the Defendant constitute an admission of the entire debt claimed as contended by the Plaintiff or an admission of part of the unresolved debt which is still pending reconciliation. It is clear that the Defendant has not expressly admitted the sum of KES. 58,392,647.00 and the question is whether such an admission can be implied from the correspondence exchanged between the parties. Although the Defendant is clearly indebted to the Plaintiff, it raises two fundamental issues regarding the totality of the claim. First, whether the Defendant owes the Plaintiff the entire debt claimed in the Plaint. Second, the issue of whether and to what extent the debt claimed is barred by limitation. The Plaintiff argues that the defence of limitation is defeated by the Defendant's acknowledgement of the debt. In the absence of an express admission, this leaves the question whether the acknowledgement is related to the part of the whole debt.

14. Despite finding that the Defendant has not expressly admitted the Plaintiff's claim as prayed in the Plaint, in its letter dated 16th October 2020, the Defendant stated that it intended to pay at least KES. 9,000,000.00 so as to clear part of what it called the non-county business balances and in that vein it proposed to pay KES. 2,000,000.00 by the end of November 2020. This admission is clear, unequivocal and unambiguous. Under **Order 13 rule 2** of the ***Rules,*** the Court has jurisdiction to make such order or give such judgment it thinks fit and just. Thus, if the court finds that part of the debt is admitted, then it may proceed to enter judgment for part of the amount that is in fact admitted. I accordingly enter judgment for the amount I have found expressly admitted. The balance of the claim shall proceed to trial.

15. In conclusion and for the reasons I have set out above, I allow the Notice of Motion dated 15th April 2020 to the following extent;

> **(a) Judgment be and is hereby entered for the Plaintiff against the Defendant for the admitted sum of KES. 9,000,000.00 only.**

(b) The balance of the Plaintiff's claim shall proceed to trial.

(c) The Defendant shall bear half the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF AUGUST 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Wataka instructed by Jared Kangwana and Company Advocates for the Plaintiff

Mr Mworia instructed by Onesmus Githinji and Company Advocates for the Defendants.