REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL SUIT NO. 1 OF 2013

DISNEY INSURANCE BROKERS LTD……PLAINTIFF

VERSUS

MOMBASA COUNTY GOVERNMENT……DEFENDANT

J U D G M E N T

1. In this suit, the plaintiff filed a plaint dated 4/7/2013, later amend on 9/2/2015 and sought the recovery of the sum of Kshs.58,958,263 from the defendant on account of insurance services offered to the defendant between the year 2011 and 2012. That sum claimed is pleaded to be the balance of a total sum of Kshs.61,958,363 out of which Kshs.3,000,000/= was paid by the defendant on 30/11/2011.

2. The claim was supported by the witness statement of one CHARLES KANYI KUIYUKA dated 9/2/2015 and a list of documents dated 9/2/2015 and further witness statement and list of documents dated 6/8/2014 and 2/3/2016 and filed in court on 12/8/2014. The three witness statements and the bundles of document show that the defendant did advertise tenders and the plaintiff did bid and was awarded the tender and an agreement dated 10/10/2011 was executed between the parties. Over and above the agreement there are documents exhibited to show the insurance covers, the invoices rendered and statement of accounts on covers issued and claims made and referred to the plaintiff for purposes of settlement and or just handling the defendants defenses before courts.

3. There is also a letter dated 13/12/2012 by the defendants successor, the municipal council of Mombasa, by which the said council not only acknowledged the sum of Kshs.59,000,000/=, as outstanding, but also apologized for the delay in settlement occasioned by poor cash flow and unexpected emergency payments. That letter even promised to pay the debt by monthly instalment of Kshs.5,000,000/=.

4. To the amended plaint the defendant filed an amended defense dated 18/3/2015. In that statement of defence the defendant abandoned its earlier defence of serious financial constraints and now pleaded that it was not bound to pay the debt because the same was incurred contrary to the dictates of the law under Public Procurement And Asset Disposal Act which required that a formal contract be executed and forbade informal extensions.

5. The authenticity of the letter of 13/12/2012 was then contested and further that no insurance covers were ever issued and that the claim for interest lacks basis. Paragraph 7 -12 of the further amended defence was then devoted to seriatin denial of the plaint save for the admitted jurisdiction of the court. The defendant also filed a witness statement signed by one RIDHWAN MOHAMMED MUMMIN dated 21/11/2014 and a bundle of documents dated 25/11/2014.

6. In the witness statement the defendants' said witness, a Senior Legal Clerk with the defendant, took the position that there was never a valid formal contract signed between the parties and the one exhibited by the plaintiff was contra statute, illegal, null and void on account of lack of compliance with the Public Procurement and Asset Disposal Act. He also took the firm position that the letter dated the 1/8/2012 and purporting to extend the plaintiffs services for provision of motor vehicle insurance cover to August 2012 was written unlawfully by a person without capacity to write it so as to bind the defendant. Even the letter dated 13/12/2012 admitting the debt of Kshs.59,000,000/= was said to be of no legal consequence for being invalid. That witness statement made no reference at all to the document filed but it is well to say that the only document filed by the defendant is the newspaper advertisement by which the defendant advertised tenders for the year 2011. It is a common document between the parties and the only evidence that the defendant did advertise for several tenders among them provision of **Insurance Services** listed as No. 21 in the said advert.

7. That is the summary of the papers filed by the parties and on which Evidence was led by them.

Evidence by the plaintiff

8. At trial the plaintiff called one witness MR. MARTINE CIIRA KARINGA, the underwriting manager of the plaintiff. He adopted his own witness statement and the witness statement filed by MR. CHARLES KANYI KUIYUKA. He also produced the bundle of documents headed **"The Plaintiff's further List of Documents"** dated the 2/2/2015 and filed in court on the 3/3/2015 comprising some 247 papers.

9. That bundle has the newspaper advert by the defendant floating tenders among them for the provision of insurance services to which the witness said the plaintiff participated and were awarded the tender as evidenced by an agreement dated 10/10/2011 at pages 2 & 3 of the bundle of documents. The witness then referred the court to copies of insurance policies, certificates together with invoices all totalling Kshs.61,958,363/= of which the defendant did pay a sum of Kshs.3,000,000/= leaving a balance of Kshs.58,958,363/= outstanding and therefore the suit. The witness then referred the court to page 197 of the bundle and pinpointed a letter by which the defendant acknowledged indebtedness and proposed an instalment payment as Kshs.5,000,000/= per month.

10. On cross examination the witness said that under the insurance Act only persons registered by Insurance Regulatory Authority are permitted to undertake insurance business and that the insurance covers were issued by the Insurance company on the plaintiffs instructions. He then conceded that he had not shown to court a company resolution authorizing Mr. Kanyi to enter into the agreement with the defendant and stated that he thought that was unnecessary. He then added that the clerk and Treasurer of the then Municipal Council of Mombasa did admit indebtedness to the plaintiff and paid a sum of Kshs.3,000,000/= on 30/11/2011. He equally admitted that there was no written agreement for payment of interests. He added that even as the matter pends in court the defendant continued to send to them claims for settlement and that the practice in the sector is that a broker maintains an account with an insurer which the insurer debits as and when it issues an insurance cover. With that evidence the plaintiff's case was closed.

Evidence by the Defendant

11. MR. RIDHWAN MOHAMED MUMMIN DW 1 adopted his witness statement dated 21/11/2014 as evidence in Chief and produced the only document filed by the defendant. He took issue with the claim on the basis that the tender process could only been concluded by a contract signed under seal of both parties and then taken through seal registration system of the defendant. To him therefore, the subject tender had many gaps and was therefore not valid.

12. On cross examination, the witness reiterated being a Senior Law Clerk and therefore a junior to Mr. Tubmun Otieno and John Ngugi who were the Town Clerk and Town Treasurer respectively. He also admitted that both were still alive and traceable at the time he gave evidence. He said that he was unable to confirm or deny if the tendering process took place or not. He denied knowledge whether the said Mr. Otieno as the then Town Clerk was ever disciplined or surcharged for having signed the documents produced by the plaintiff. He however, confirmed that Mr. Tubmun Otieno remained the clerk throughout even when the letters for extension were written and signed. Lastly, the witness admitted having received and seen claims and letter forwarding such claims to the plaintiff for settlement. He confirmed knowledge that part of payment was made.

13. On re-examination, the witness repeated that after the advert a tendering process was expected to follow and that a contract would have been signed under seal. On negotiations the witness said there were attempts at negotiations but no settlement was reached. When questioned by the court the witness said that during the year when he wrote his witness statement Mr. Otieno Tubmun was still employed by the defendant but he did not seek to talk to him and lastly that during the year 2011 – 2012 it was the plaintiff who provided insurance services to the defendant. With that evidence the defence case was equally closed and parties were then directed to file and exchange submissions.

Submissions by the plaintiff

14. Having outlined the facts of the case, the plaintiff opted to submit under two headings; whether there was a valid contract between the parties and whether the plaintiff was entitled to the remedies sought.

15. On the validity of the contract the plaintiff cited the decisions in ***Veteran Pharmaceuticals Ltd vs Coast Provincial Hospital & Another [2016] eKLR*** and ***Veteran Pharmaceuticals Ltd vs Kingundo Level 4 Hospital & Another [2016]*** for the proposition that a party cannot rely on own misdeeds to resile from a contract it has initiated and benefited from. The submissions highlighted the fact that the defendant here was infact the 2nd defendant in the case of Coast General Hospital and argument akin to those advanced here were dismissed as unsustainable. It was then argued that to uphold the defendants position would be to reward unjust enrichment at the expense of the plaintiff. For that reason the decision in ***Kamau Macharia vs Kenya Commercial Bank Ltd [2003] eKLR*** and ***Roots Capital Incorporated vs Takaungu [2016] eKLR*** were cited for the proposition that the same public policy against enforcement of illegal contracts would militate agents a defendant who has gained from an impugned contract to keep and possess the benefit at the expense of the plaintiff. Additional reliance was placed on the Supreme court claim in ***Anaj Warehousing Ltd vs National Bank Ltd [2015] eKLR*** for the same propositions.

16. On whether the plaintiff is entitled to be granted the reliefs sought the plaintiff stressed the point that there being sufficient evidence of a contract and its performance on the part of the plaintiff coupled with part payment of the consideration and acknowledgment of the debt and the defendant having failed to rebut the critical aspects of the evidence led, the evidential burden then shifted to the defendant to dislodge the plaintiffs claim. The decision in ***Munyu Maina vs Hiram Gathiha Maina [2013] eKLR*** and ***Linus Nganga Kiongo vs Town Council of Kikuyu [2012] eKLR*** for the proposition that where a defendant fails to adduce evidence, the evidence by the plaintiff stand unchallenged. It was then submitted and argued that the failure by the defendant to call its Chief Officer at the time the contract was entered into should be construed to mean that had the officer, Mr. Tabmun Otieno been called he would have given adverse evidence against the defendant. For that submission the plaintiff cited to court the decision in ***William Cheruiyot Kandie vs Republic NBI CR APPEAL NO. 21 OF 1996***.

17. These submissions were reiterated by Mr. Gikandi when the counsel attended court to highlight the submissions only to add that by operation of section 120 of the Evidence Act a party who has led the other to take a course believing all to be well cannot be allowed to resile

and is estopped from running away from that position after the person to whom the representation is made has altered his position to his detriment and to the benefit of the person making the representation.

Submissions by the defendant

18. The defendant filed submissions dated 24/7/2017 on 25/7/2017. In which submissions the defendant underscores the fact that the plaintiff did not produce evidence that it participated at the tendering process; that it was only a brokerage firm and not an insurer, that the contract was signed by only one director and not two nor was it signed under seal as the law mandate. On the letter acknowledging the debt, the defendant submitted that PW 1 did not state when and how the plaintiff record the same.

19. On the evidence by the defendant, the submission highlight the point that the defendant could only enter into a valid contract if the same was executed by both the Town Clerk and Town Treasurer under the seal of the then Municipal Council of Mombasa. For the defendants' seal to be affixed, the witness was reported to have said that it required a council's resolution and that the contract had to be accompanied by a performance board. The submissions then sum up by stating that there was no valid contract concluded between the parties and that any allegedly entered into was null and void for want of compliance with the provisions of public procurement and Asset Disposal Act.

20. On the law regarding procurement of insurance services, the Defendant relied on Section 68 of the Public Procurement and Asset Disposal Act and Section 19 of the Insurance Act for the submissions that a contract of procurement must be in writing and that only a licensed person can carry out insurance business. Those provisions were cited to prop the defendant's position that it was the duty of the plaintiff to adduce evidence in proof that there was a valid contract between the parties. Reliance was then placed on the decision in ***Pakatewa Investment Co. Ltd vs Municipal Council of Malindi [2016] eKLR*** and ***Mwangi Stephen Muriithi vs City Council of Nairobi [2015] eKLR*** in which the court held that an unauthorized act of an employee cannot bind an employer and that in the absence of a valid contract no title passes. The decision of the ***Court of Appeal in Kenya Ports Authority vs Fadhili Juma Kisuwa [2017] eKLR*** was also cited for the proposition that a Court of Law cannot lend credence of its aid to an immoral or illegal contract.

21. To those written submissions, Mr. Obinju only highlighted the finding in Pakatewa Case (supra) that where public money is at stake the law require that lawful procedures be followed.

Issues for determination

22. From the file, the plaintiff had proposed some 6 of issues in a list of issues dated 6/8/2014 and filed in court on 12/8/2014. However in its submissions the same have been reduced into two even though the defendant sees 3 issues. Having read the entire file and the submissions by the parties I consider that there are only two substantive issues for determination beyond the consequential issues regarding costs and interests. Those issue are:-

a. Was there a valid and an enforceable contract concluded between the parties.

b. Is the plaintiff entitled entitled to the remedies sought.

Analysis and determination

23. Before I proceed to the determination of the isolated issues, I wish to comment on some issues raised by the defendant and which appear to be substantive but equally connected to the issue of the validity of the contract. The first was that after conclusion of the tender process the plaintiff was bound to provide a performance bound. This to me is a matter that does not arise from the pleadings. I hold it does not arise at all because the defendant has not pleaded it in the defence neither did it arise in the witness statement of its witness. In any event, I understand a performance bond to only come into play if it is made a condition in the tender document and only due to be availed once the tender is awarded. Here the defendant disputes the tendering process having taken place and therefore it is difficult to understand how that argument has been invited into the matter. I find that parties are bound by their pleadings and a party can only lead evidence to support an allegation in the pleading. Any evidence led outside the pleading would constitute a departure from the pleading, would not be admitted and if taken down on record would be so taken *gratis* and of no assistance to the matter in dispute.

24. In this matter however, the issue has been introduced only by submissions. It was never in the witness statement filed nor in the evidence tendered under oath and therefore it was improperly raised in the submissions. May I repeat the law that submissions are not evidence but a summary of the evidence adduced as applied to the law applicable.

25. The other issue raised in the submissions is that the plaintiff did not produce in court evidence that it is an insurance broker authorized to transact insurance business. The answer to that is found on what I have found in the foregoing paragraph but also in the pleadings filed.

26. In the plaint at paragraph 3, the plaintiff is described as an insurance brokerage firm. That pleading is expressly admitted by the defence at paragraphs 1 & 3 of the further Amended defence. I am therefore not in doubt that the capacity of the plaintiff as an insurance broker was not in dispute and cannot be made an issue. The court only determine issues between parties but cannot be called upon to determine an non-issue when one party asserts a point and the other concedes the same.

27. Now on the first issue regarding the validity of the contract, it is not disputed that the defendant did advertise for some service and called for bids for the same. It is also not disputed, but was infact confirmed by DW 1, that during that year 2011 and 2012 the defendant was

afforded insurance services by the plaintiff as a consequence of which the defendant has in the past passed onto to the plaintiff claims to be handled. Additionally, it is conceded that part payment in the sum of Kshs.3,000,000/= was effected in favour of the plaintiff by the defendant. Prima facie there is also a written agreement signed between the parties.

28. The totality of the evidence is therefore that there was an agreement between the parties for the provision of insurance services which was performed by the plaintiff availing to the defendant insurance covers for a period on the expectation that premiums thereof would be paid. Having gone that length and it being pleaded in the defence dated 1st March 2013 that it owed Kshs.59,000,000/= and was always willing to pay but had not paid due to financial constraints, the defendant should not now taken seriously to say that there was no contract.

29. This must be frawned upon by the court and indeed any party with a sense of justice and fairness. To hold that there was no contract and therefore no justificiable claim by the plaintiff would leave one question begging. How does the law undo and retrieve the benefit already obtained and enjoyed by the defendant? If it cannot be retrieved then the defendant as a public body shall have benefitted from services without consideration. In common parlance, it shall have conned the plaintiff out of insurance services a matter that would beg the question whether it shall have answered to the constitutional dictates at Article 10 demanding from state organs, state officers and public officers integrity, transparency and accountability.

30. Such must be discouraged of state organs like the defendant and it should not be a solo voice for the courts only but it behoves every Kenyan and indeed every person seeking to associate with the Kenyan Nation to expect of and enforce against state organs their duty to observe the national values and principles. The defendant should not be a stranger to that stand of the law because it was a party before the court in ***Veteran Pharmaceuticals Ltd vs Coast General Hospital & County Government of Mombasa(supra)*** when the court said:-

> **"The primary duty of ensuring compliance with the requirements of the public procurement and Asset Disposal Act lies with the procuring entity, namely the defendants herein. It would be inequitable for them to raise their own wrong doing as a defence when it has neither been alleged nor proved that the plaintiff was an accomplish to the irregularities alluded to by the defendant in their defence".**

31. I understand the law as enacted and annunciated in stare decisis and grounded on the Latin *ex turbp causa non oritur action,* to be purposed to discourage contracts which are injurious to the public by going against the public policy and or enacted statutes. In this case one may ask what injury would be seen to have been occasioned to the public by the plaintiff offering to provide insurance services to the defendant when it is in evidence that there is indeed a written contract signed by on behalf of the defendant by no other than its chief executive officer at the time!!

32. I hold the view that it has come a time when the principle of law that a court of law should never lend credence or a hand to an illegal or immoral contract should not and must not be applied blindly and in order to perpetrate injustice. If it be a principle of law, it must be seen and be applied to further justice and fairness and there cannot be justice when an outright deprivation of property is to be blessed and rewarded. The maxim has all along been applied with an exception that a party who is the victim of an illegal intent is not barred from recovering a benefit bestowed upon the party with the illegal intent. In the English case of ***Archbolds (Freightage) Ltd vs S. Spangletee Ltd*** quoted with approval by the ***Court of Appeal (Nyarangi, Gachuhi & Aploo JJA) in Patel vs Sing (No.2) [1987] KLR 585*** laid bare the exceptions way back in 1987 as follows:-

> **"The effect of illegality upon a contract may be threefold. If at the time of making the contract there is intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his right under it he has to rely upon his own illegal act;**

33. In this excerpt, I read the Court of Appeal to say that the person with illegal intent ought no to be allowed to enforce a contract thereby entered and use the illegal intent, guilty mind, to prove his right. It is the guilty party that ought not to be rewarded but the victim need not be denied the right to remedy a wrong so committed.

34. That spirit did not die then, because the same Court of Appeal in 2016, in ***Root Capital Incorporated vs Takaungu Farmers Co-operative Society Ltd [2016] eKLR*** while quoting with approval the Supreme Court of United Kingdom said:-

> **"Just as the policy considerations would bar a claimant from enforcing an illegal contract, the same considerations should not allow a defendant who has benefitted from such a contract to possess or keep what he has been paid under the contract".**

35. Coming from the understanding that the policy behind abhorrence to enforcement of contracts tainted with immorality or illegality is to stop one from profiting from own illegality, one may ask what unjust benefit may flow to the plaintiff in this case by his acts of offering services to the defendant. For me, I am unable to see any. However, in this case I must say that there cannot be an illegality. It is not alleged that the plaintiff caused or immorally influenced the defendant to advertise tenders and call for bids. It is equally not contended that the plaintiff had infact not provided the services so advertised. What the defendant contends is that there were no minutes to execute the agreement with the plaintiff. That contention is held without an attempt by the defendant to explain what else transpired after the advertisement. The defendant would have done well to say more on the happenings after the advert. It did not however.

36. It would be a different scenario if the defendant would avail to court material to the effect that the tenders were called off, cancelled or not pursued; or that the tendered were indeed pursued but somebody else, not the plaintiff, was awarded the same. And failure to produce that material sits in consonance with the failure to call Mr. Tubman Otieno or John Njoroge the two people at the helm of the predecessor to the defendant when the contract was entered into. Keeping away the important material and the critical persons can only force the court to

draw the adverse inference that if availed the same would be against the defendants' case.

37. Before I pen off, it may be necessary to just add that our own Supreme Court, in a decision that emanated from this registry, has provided the most current undisputed position of the law. In National ***Bank of Kenya Ltd vs Anaj Warehousing Ltd (supra)*** the court said:-

> **"Just as the law frowns upon unscrupacous lenders especially those whose actions would fetter the equity of redemption so also must it frown upon unscrupulous borrowers whose actions would be to extinguish the letters right to realize her or his security. There is to be, in law, a substantial parity of rights claims, as between the lender and the borrower.**
>
> **…To invalidate an otherwise binding contractual obligation on the basis of a precedent or rule of common law even if such course of action would subvert fundamental rights and freedoms of those individual would run contrary to the values of our constitution as enshrined in article 40…"**

38. Rights are just but rights be they contractual or constitutional. The law exists for the smooth regulation of rights and personal relationships. When the Supreme Court uses the expression unscrupulous lenders and borrowers, one can, and I am prepared to read that those words equally to fit for unscrupulous tenderers as well as unscrupulous procuring entities. There ought to be substantial parity of their rights in order that the law is not seen to frown upon an illegality so as to make a wrong a rewardable.

39. I have said enough to conclude that there has not been evidence that the agreement exhibited to court by the plaintiff as well as the letter acknowledging the debt were ever procured by any immoral or illegal conduct by the plaintiff so as to invite the application the maxim *ex turpi non oritur* actio against the plaintiff.

40. I do find that the contract was validly entered into and it is therefore a legal and enforceable contract which has been fully performed by the plaintiff and partly by the defendant in their respective obligations.

41. That finding, then as of necessity, must lead to a finding that the plaintiff is entitled to his bargain under the contract which is the obligation of the defendant in the same contract – to pay the consideration for services duly rendered and enjoyed by the defendant. Having so found, I now enter judgment for the plaintiff against the defendant not for the admitted sum of Kshs.59,000,000/= or Kshs.58,000,000/= as submitted by the plaintiff, but for Kshs.58,958,263/= as pleaded in the further amended plaint and proved by the invoices and other documents produced at trial.

42. On costs, the law is that they must follow the event of the proceedings which in this case is the success by the plaintiff. There is no reason to disentitle the plaintiff to the costs which I hereby award to it.

43. A lot was said about the interest and the rate thereof. The law under Section 26 Civil Procedure Act is that the award of interest, its rate and the time of commencement, is at the discretion of the court. I also appreciate that the purpose of interest in a judgment is to compensate the successful party in a litigation for liquidated claim for the time his money has been keep away from him thereby denying him the opportunity to use it or just invest it.

44. In the instant case, there being no contractual rate covenanted between the parties, I award to the plaintiff interest on the claimed and awarded sum at the prevailing court rates. It shall be calculated from the date of the suit till payment in full.

45. It is so ordered.

Dated and delivered at **Mombasa** this **28th** day of **February 2018.**

P.J.O. OTIENO

JUDGE