



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 366 OF 2013

GETRIO INSURANCE BROKERS LIMITED..... PLAINTIFF

VERSUS

KENYA AGRICULTURAL RESEARCH INSTITUTE DEFENDANT

RULING

1. The application before Court is a **Notice of Motion** Application dated **13th September 2013**. It is filed under Order 36 Rule 1 of the Civil Procedure Rules and seeks the following order:-
 - a. ***That the Honourable Court be pleased to enter summary judgement against the Defendant for the sum of kshs.14,007,324.30 plus interests and costs.***
2. The Application is premised on the grounds set out therein and is supported by the affidavit of **CHARLES NDEMO MAINA** dated 13th September 2013 with its annexures and a supplementary affidavit dated **28th November 2013**.
3. The application is opposed by the Defendant through a replying affidavit sworn by **SAMMY MAINA NDEI** dated **4th November 2013** with annexures.
4. The brief history of the application is that the Plaintiff filed the suit herein on 22nd August 2013 seeking the orders mentioned therein among them Kshs.14,007,324.30. The Defendant filed a defence on 23rd September 2013 and denied the Plaintiff's claim, but acknowledged the factors leading to the current dispute. It appears that the dispute in question relates around a Service Contract dated 1st October 2012. Both parties have in their very detailed submissions tried to persuade me to see their point of logic and to agree with them.
5. The Plaintiff submitted that the Defendant breached the Agreement dated 1st October 2012 by unilaterally terminating it. As a result of that breach, the Plaintiff claims its entitled to award of damages amounting to Kshs.14,007,324.30 being insurance commission that the Plaintiff would have earned had the Defendant not breached the Agreement. The Plaintiff further submitted that the defence is not capable of raising a *bonafide* triable issue as it is a sham, hence the suit ought to be dealt with summarily. The Plaintiff then raised several issues to be determined. Those issues are contained in paragraphs 4 to 16 of the Plaintiff's submissions. Among those issues are the allegations that the defence filed in court on 23/0/2013 is improperly before this court because the Plaintiff submits that once an application for summary judgement is filed, the Defendant can only file a defence to the suit with the leave of the court, which was not sought.
6. On its part, the Defendant submitted that the defence had triable issues and took the court through

the salient features of the said Service Contract. The Defendant then listed what in its view are triable issues and those are:-

- ***Whether the agreement was for one year or two years.***
- ***Whether the Defendant breached the Agreement.***
- ***Whether the Plaintiff breached the Agreement.***
- ***Whether the Defendant was entitled not to extend the Agreement for another period of one year.***
- ***Whether the Defendant was privy to the Agreement on commission payable to the Plaintiff by the underwriter.***
- ***How much money in commission the Plaintiff received from the underwriter.***
- ***Whether the Defendant can be held liable under an Agreement it was not privy to, among others.***

7. I have considered both the Plaintiff and the Defence. I have also considered issues which a trial court would determine, whether raised by the Plaintiff or by the Defendant.

8. Order 36 Rule 1 of the Civil Procedure Rules empowers this court to exercise its discretion to grant summary judgement where, *inter-a-alia*, the Plaintiff seeks judgement for a liquidated demand with or without interest and in a case where the Defendant has appeared but has not filed a defence.

9. The Plaintiffs' suit is for a liquidated claim of Kshs.14,07,324.36. The application herein was filed on 16th September 2013 after the Defendant had entered appearance on 9th September 2013. The application was filed before the Defendant filed its defence on 23rd September 2013. Clearly, the defence is improperly before the court because once an application for summary judgement is filed, the Defendant can only file a defence to the suit with the leave of the court.

10. However, the powers given under the said Order 36 are discretionary, and the court must exercise that power judiciously and in the interest of justice for all the parties.

11. Under Order 36, Rule 2 the court may grant the Defendant the leave to defend the suit if the Defendant proves the existence of triable issues, and also shows that there was no unreasonable delay for the filing of the defence or that the delay was not intentional.

12. I have considered the proposed issues to be determined in the trial, and I am satisfied that there are triable issues raised in the defence, and that the Defendant should be given a chance to defend the claim.

13. I have also noted that the Defendant has not been negligent in filing the defence, and there is no indication that filing the defence on 23rd September 2013 was with an intent to cause delay. Rather, I think it was the Plaintiff who appear to have been over-diligent and ensured strict timelines, causing the Defendant to lag behind.

14. In the upshot I make the following orders:-

- a. ***The Plaintiff's Notice of Motion application dated 13th September 2013 is not allowed.***
- b. ***The Defendant's defence dated 20th September 2013 and filed in court on 23rd September 2013 is deemed properly on record.***
- c. ***The costs of the application is hereby assessed at Kshs.10,000/= and given to the Plaintiff/Applicant to be paid within 7 days of this Ruling.***

DATED, READ AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Kiprono for Plaintiff

M/s Kiniti holding brief for Burugu for Defendant

Teresia – Court Clerk