REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 183 of 2011

GETRIO INSURANCE BROKERS LTD.....PLAINTIFF

VERSUS

MWALIMU NATIONAL CO-OPERATIVE SAVINGS & CREDIT SOCIETY LIMITED.....1ST DEFENDANT

CIC INSURANCE GROUP LIMITED.....2ND DEFENDANT

R U L I N G

1. The Application before this court is brought by way of Notice of Motion dated 24 January 2012 coming under Certificate of Urgency. The grounds upon which the application is brought our detailed as follows: –

"a) That the Plaintiff submitted to the 1st Defendant a successful quotation for insurance brokerage services for the period 01/01/2012 to 31/12/2012.

b) that the Plaintiff was the holding insurance broker for the 1st Defendant for the period 01/01/2011 to 31/12/2011 with the 2nd Defendant as the underwriter.

c) That the 2nd Defendant had authorized the Plaintiff to negotiate and execute a contract with the 1st Defendant for insurance services on its behalf.

d) That the Plaintiff negotiated the most competitive rates with the 2nd Defendant on behalf of the 1st Defendant.

e) That the 1st Defendant has without any justifiable reason directed the 2nd Defendant to issue insurance covers through a certain broker and agent based on the premium rates negotiated by the Plaintiff with the 2nd Defendant.

f) That the 1st Defendant has further directed the 2nd Defendant to treat the Loan Guard Insurance policy as a direct business based on the premium rates negotiated by the Plaintiff with the 2nd Defendant.

g) That the 1st Defendant's action if permitted will extinguish the Plaintiff's reasonable expectation and/or right to earn the insurance commission herein based on the quotation submitted to the 1st Defendant.

h) That unless restrained by this honourable court the Defendants are likely to make payment of the insurance commissions to person and/or entities other than the Plaintiff.

i) That the Applicant will suffer monetary loss which will not be adequately compensated by way of damages.

j) That the Applicant has established a prima facie case with high chances of success.

k) That the balance of convenience is in favour of the Plaintiff as it is the entity that submitted the successful quotation to the 1st Defendant.

l) That it is in the interest of justice, fair, expedient and convenient in all circumstances of the case that the application be allowed".

2. The application is supported by the Affidavit of **Charles Kimenyi Macharia** who describes himself therein as the Managing Director of the Plaintiff Company. He detailed in his said Affidavit that the Plaintiff was the 1st Defendant\'s insurance broker for the period first of January 2011 to 31 December 2011. However, sometime in November 2011 the first Defendant sought to prequalify suppliers for goods and services for the year 2012. The deponent detailed that the Plaintiff had participated in the prequalification exercise and was subsequently prequalified by the first Defendant for the provision of insurance brokerage services. By letter dated 19 December 2011, the first Defendant invited the Plaintiff to submit its quotation for various insurance covers. The Plaintiff thereafter requested quotations from underwriters for the Schedule of Insurance covers. Of particular concern was the Loan Guard policy which was with the second Defendant who was the holding underwriter. On 20 December 2011, the second Defendant provided details of the said Policy noting that there would be an increase in annual premium as a result of the first Defendant\'s claims experience over the past insurance year. Further, the deponent stated in the said Affidavit that the Plaintiff had requested the second Defendant to quote for the general insurance policies. The deponent noted that the Plaintiff\'s quotation was evaluated and found to be the successful quotation. The deponent noted that the first Defendant had directed the second Defendant to place the general insurance covers with the second Defendant through a certain broker and agent based on the premium rates negotiated by the Plaintiff with the second Defendant. The deponent also commented that the first Defendant had further directed the second Defendant to treat the Loan Guard policy as direct business on the basis of insurance premium rates negotiated by the Plaintiff with the second Defendant. He went on to say that the first Defendant has, since that time, paid insurance premiums for the said policies to the second Defendant based on the insurance premium rates negotiated as between the Plaintiff and the second Defendant. Mr. Macharia then the deponed to the fact that he had been advised by the Plaintiff\'s advocates on record that the first Defendant\'s action is in contravention of the letter and spirit of the Public Procurement and Disposal Act as read with the Regulations thereto. He was of the view that the first Defendant must place the said insurance covers with the second Defendant through the Plaintiff because it was the Plaintiff that had submitted the successful quotation. It was the Plaintiff\'s reasonable expectation to earn insurance commission on the said insurance covers from the second Defendant amounting to Shs. 12,009,083.10. The deponent then gave details in his said Affidavit of correspondence sent by the Plaintiff\'s advocates to the first Defendant prior to this suit being filed. He maintained that unless restrained by this court, the Defendants will proceed to make payments of the insurance commission to persons and/or entities other than the Plaintiff.

3. The application under Certificate of Urgency came before my learned brother Kimondo J. on 27 January 2012. He directed that there would be an inter-parties hearing on 8 February 2012 but as a result of the Plaintiff having not demonstrated by documentary evidence, that it won the bid to be the exclusive insurance broker for the first Defendant, he declined to grant any temporary injunction at that stage. The matter next came to hearing before Kimondo J. on 8 February 2012 when the hearing of the application was taken out of the Hearing List and fixed by consent of the parties for the 27 February 2012. The

learned judge gave leave to the Plaintiff to file and serve a Supplementary Affidavit within seven days and corresponding leave was granted to the first and second Defendants to file and serve a Further Affidavit and a Replying Affidavit respectively, within 14 days. When the matter came before the learned Judge on 12th of March 2012, the advocate for the applicant stated that he required more time to file a Replying Affidavit. In the events, the learned Judge granted leave to the Plaintiff to file a Supplementary Affidavit within 14 days. He granted corresponding leave to the Respondents to file further affidavits if need so arose. He also ordered that the parties should file and exchange skeleton submissions before the next hearing of the Application which the fixed for 23 April 2012. Unfortunately, the learned judge was temporarily transferred away from the Commercial Division of this court and consequently the matter next came up for hearing before me on 4 July 2012.

4. The Chief Executive Officer of the first Defendant one Mr. J. O. Ojall, swore a Replying Affidavit on 7 February 2012. He initially stated that the Plaintiff herein was prequalified among other insurance firms upon contractual terms and conditions for the year 2010 – 2011 to tender for quotations as and when they were invited to tender. He detailed that the first Defendant was to invite quotations from the pre-qualified firms from time to time as and when the need arose. He maintained that the tender for the pre-qualification of suppliers of goods and services for the calendar year 2012 had been submitted to the first Defendant but had/has not been awarded. He detailed that the Plaintiff herein was specifically invited to tender quotations for the insurance of Fire and Perils, Motor-Vehicle Comprehensive and Private and no more. The deponent stated that by virtue of pre-qualification, the first Defendant did not expressly contract to give the Plaintiff all or any of its insurance business or at all. He stated that at no point in time did the first Defendant invite the Plaintiff to tender a quotation for the Loan Guard Policy. He said that the Plaintiff\'s quotation contravened the express requirement of submitting quotations from underwriters for the insurance of Fire and Perils, Motor Vehicle Comprehensive and Private. He noted that the Plaintiff\'s bid was non-responsive and was not acceptable to the first Defendant hence the bid was not awarded to it. As if that was not enough, the deponent maintained that the first Defendant did not advise the Plaintiff that its quotation was successful or at all. The apparent insistence by the Plaintiff that it had submitted the successful quotation was *"misplaced, misconceived and appalling and is an outright affront to the law of contract"*. As the Plaintiff\'s quotation and/or bid was unsuccessful there was no communication from the first Defendant to that effect. The deponent detailed that the Plaintiff cannot imply acceptance, in the absence of the first Defendant\'s communication, to that effect. Finally, Mr.Ojall observe that no prima facie case has been established by the Plaintiff to warrant the injunctive relief that it sought and that it cannot claim commission as the work was not awarded to it especially in respect of quotations that the Plaintiff was never invited to submit.

5. Not entirely unexpectedly, Mr. Macharia swore a Supplementary Affidavit in reply dated 16th of February 2012. He claimed that it was not true as alleged by Mr. Ojall that the first Defendant had not awarded the tender for the pre-qualification of suppliers for the calendar year 2012 to the Plaintiff. He referred to the letter from the first Defendant dated 19 in December 2011 exhibited as "CKM 2" to his first Affidavit which he said clearly indicated that the request for quotation was done pursuant to a pre-qualification exercise conducted at the beginning of the year. Having received that letter, the deponent stated that the Plaintiff immediately obtained the Request for Insurance Quotation from the first Defendant, as the same did not accompany the invitation letter. He thereafter attached what he termed as the full "Request for Insurance Quotation" marked as exhibit "CKM 13". Mr. Macharia maintained that the failure of the first Defendant to enclose the Request for Insurance Quotation with the invitation letter ("CKM 2") was a deliberate attempt to lock out the Plaintiff from participating in the tender as the first Defendant knew that time was of the essence. He observed that the Request for Insurance Quotation from the first Defendant contained more insurance covers than those that had been indicated in the letter dated 19 December 2011. It was on the basis of the Request for Insurance Quotation, that the Plaintiff submitted its quotation to the first Defendant on all the policies listed in the said Request for Insurance Quotation. Somewhat surprisingly, Mr. Macharia went on to detail that he had been advised by the Plaintiff\'s advocates that the primary documents in a tender process is the tender document and not a covering letter. In this case, he maintained that the tender document was the Request for Insurance Quotations. He noted that the said Request contained other policies including the Loan Guard policy. The said Affidavit thereafter detailed various comments as to the process of tendering and more particularly detailed that the first Defendant\'s assertion that the Plaintiff's quotation was non-responsive and held no water and was an

afterthought based on the following reasons: –

"a) The Plaintiff's quotation was in conformity with the Request for Insurance Quotations issued by the 1st Defendant.

b) The 1st Defendant, a public entity, was under legal duty to inform the Plaintiff that its quotation had been evaluated and found to be non responsive, if at all.

c) The Plaintiff has to date not received any communication from the 1st Defendant to the effect that its quotation was evaluated and found to be non responsive.

d) The 1st Defendant indicated in its letter dated 12th January 2012 (annexture CKM 10) that it was "consulting on the issues raised". If the Plaintiff's quotation was non responsive as alleged, the 1st Defendant should have taken that opportunity to inform the Plaintiff's advocates as much.

e) Even after "consultation on the issues raised" the 1st Defendant did not revert back on 17th January 2012 as they had promised in their letter dated 12/01/2012 to at the very least inform the Plaintiff's advocates that the Plaintiff's quotation had been found to be non responsive by its evaluation committee".

6. Somewhat unsurprisingly, Mr. Ojall for the first Defendant filed a Further Replying Affidavit on 27 February 2012. He had read the Supplementary Affidavit sworn by Mr. Macharia on behalf of the Plaintiff. He stated that the Request for Insurance Quotations that was furnished to the Plaintiff had indication of the quotations for which it was to tender and these were clearly marked with a (√) sign as against the relevant quotation. These were that of Fire and Perils, Motor Vehicle Comprehensive and Private and no more. The deponent had been advised by his advocates on record that there is no statutory obligation on the part of the first Defendant to invite the Plaintiff to bid for all of the tenders. He noted that the Plaintiff is not the only insurance broker in the market and at no point had the first Defendant contracted to give the Plaintiff all of its tenders. He maintained that the fact that the Plaintiff took upon itself to bid for all the tenders and expected to be awarded all of them, spells mischief, is against fair competition and not binding on the first Defendant. He maintained that the first Defendant had conducted an open tender in which interested players in the market were allowed to bid and in which the plaintiff participated. Apart from detailing other matters upon which he had been advised by the first Defendant\'s advocates on record, the deponent reiterated that the Plaintiff\'s tender was non-responsive as he had failed to fill and provide all the pertinent and correct information that was required by the first Defendant in respect to the invitation to tender for quotation of the three particular policies. This was material to the tender process and is not an afterthought.

7. On 5 March 2012, the Legal Services Manager of the second Defendant, one Mary Wanga swore a Replying Affidavit. The first point that she raised therein was that she had been advised by the second Respondent\'s advocates that the underlying suit upon which the said application is grounded, discloses no cause of action against the second Respondent. It followed therefore that the said application is equally incompetent, bad in law and an abuse of the court process. The deponent admitted that the first Defendant did invite tenders for the pre-qualification of suppliers of various goods and services for the calendar year 2012. It was also correct that the Plaintiff duly prequalified for the provision of insurance brokerage services. She detailed that it was clear from the letter dated 19 December 2012 that the Plaintiff was invited to submit its quotation in respect of insurance for Fire and Perils, Motor Vehicle Comprehensive and Private only. The deponent referring to the affidavit in support of the application noted that the mere submission or quotation does not amount to a contract always bearing in mind that in December 2011 the second Defendant was not privy to the fact that the Plaintiff had only been invited to submit quotations in respect of insurance cover for Fire and Perils, Motor Vehicle Comprehensive and Private only. As to the allegation made by Mr. Macharia in paragraph 11 of the Affidavit in support of the application, the deponent categorically denied the same and stated that the exhibit "CKM 7" allegedly emanating from the

second Defendant was a forged document and that it was instructive to note that the signature thereto bears no designation unlike all other letters emanating from the second Defendant. She did not deny that the second Defendant had received a letter dated 19 December 2011 from the first Defendant, inviting the second Defendant to directly quote for the provision of certain insurance services. It had responded thereto by letter dated 27 December 2011 in which it attached various quotations in relation to the Loan Guard Policy, the Employee Group Life, general insurances and the Group Medical insurance. So far as the first Defendant\'s appointment to provide insurance brokerage services, the deponent stated that by its letter dated 3 January 2012, the first Defendant had appointed the Cooperative Insurance Company Limited as its underwriter for the Loan Guard Policy (with no broker), that three policies for Money, Fidelity Guarantee and All Risks would be placed under Glacier Insurance agency and for the Group Personal Accident Policy the same would be under Fairsure Insurance Brokers Limited. Commenting generally upon the practice in the insurance business, the deponent stated that the insurance broker is regarded as the agent of the insured/policyholder and that such insured/policyholder must first endorse a broker/agent before the latter can claim or earn any commission. In the event that the Plaintiff had not been appointed as the first Defendant\'s broker then it would have no valid claim in respect of commission. In the view of the deponent, the Plaintiff had not earned the commission as alleged or at all. The deponent concluded her Replying Affidavit by stating that she had been advised by the second Defendant\'s advocates that the Plaintiff\'s application showed no prima facie case with any probability of success, that the Plaintiff had not shown that it would suffer irreparable damage which could not be compensated by way of damages and that the balance of convenience clearly tilted in favour of the Defendants.

8. In its submissions to court, the Plaintiff referred to the various affidavits filed in connection with the application. It spelt out the main grounds of the application and detailed that the only issue for determination at this stage, is whether the court should exercise its discretion in favour of the Plaintiff and grant an order of interlocutory injunction pending the hearing and determination of this suit. The Plaintiff went on to detail that the principles for the grant of an interlocutory injunction are now well settled and clearly spelt out in the stock case of **Giella v Cassman Brown and Co Ltd (1973) EA 358.** As regards the establishment of a prima facie case the Plaintiff invited the court to examine exhibits "CKM 2", "CKM 13" and the Plaintiff\'s quotation being exhibit "CKM 8". It maintained that the primary documents in a public tender process is a tender document and not a covering letter. It submitted that **section 52** of the *Public Procurement and Disposal Act (2005)* clearly enumerated what a tender document ought to contain. Such detailed that it should also contain sufficient information to allow fair competition among those who may wish to submit tenders. The Plaintiff submitted that exhibit "CKM 2" did not provide enough information and consequently the Plaintiff had to resort to exhibit "CKM 13" for the requisite information. It is further submitted that the contradiction between the letter being exhibits "CKM 2" and the Request for Insurance Quotation (exhibit "CKM 13") should not be construed to the detriment of the Plaintiff as it was not the author of the two documents. The Plaintiff then stated that if the first Defendant did not want it to quote for all the policies contained in the Request for Insurance Quotation, it should have issued the Plaintiff with a Request for Insurance Quotation with only the policies contained in exhibit "CKM 2". The Plaintiff maintained that the First Defendant having issued exhibit "CKM 13" to the Plaintiff, it was now estopped from arguing that the Plaintiff should not have submitted quotations on all the policies contained therein.

9. Continuing its submissions, the Plaintiff maintained that the second Defendant had by its letter dated 21st of December 2011, authorised the Plaintiff to submit its quotation and sign the resultant contract with the first Defendant as per exhibit "CKM 7". The Plaintiff wondered why the second Defendant had reneged on its agreement and decided to directly engage with the first Defendant, to the detriment of the Plaintiff. I didn\'t quite understand the Plaintiff\'s submission that exhibits "CKM 4", "CKM 5" and "CKM 6" indicated the relationship/ partnership that existed between the Plaintiff and the second Defendant. Having looked at the documents they are no more than what the Plaintiff requested of the second Defendant as per paragraph 8 of the Supporting Affidavit. The Plaintiff then made the extraordinary submission that the first Defendant in its Replying Affidavit had deliberately failed to disclose to the court what it considered to be certain important facts namely that the first Defendant was liable to disclose to the court names of the tenderers who had submitted successful quotations, the insurance premium rates submitted by the successful bidders, an explanation as to why the Plaintiff\'s

quotation was found to be non-responsive and whether there were other participating underwriters other than the second Defendant. The Plaintiff maintained that under the provisions of **section 67 (2)** of the *Public Procurement and Disposal Act*, the first Defendant was obliged to, at the same time as the person submitting the successful tenderer is notified, notify all other persons submitting tenders, that their tenders were not successful. The Plaintiff then went on to detail that the first Defendant had asserted that its bid was non-responsive and such held no water for various reasons as set out in the Supplementary Affidavit of Mr. Macharia (supra).

10. The Plaintiff and then made a number of observations as to why Fairsure Insurance Brokers had been awarded the Group Personal Accident policy where such policy was not one of the policies that the brokers had been invited to submit quotations upon. It maintained that the first Defendant\'s allegation that the Plaintiff\'s quotation was non-responsive lacked merit. The submissions denied the suggestion as contained in the Replying Affidavit of Mary Wanga that exhibit "CKM 7" is a forged document alleging that it had been sent to the Plaintiff by one Kiplimo by e-mail and that he was an employee of the second Defendant, who had signed the same. It maintained that the absence of a designation in the letter does not make it a forgery. The remainder of the Plaintiff\'s submissions contained comments as regards the evidence detailed in the Replying Affidavits, upon the unfairness of the process and that the second Defendant had been favoured by the first Defendant as regards the various matters in connection with the first Defendant\'s insurance policies. It dwelt at length as regards instances where it felt that the first Defendant had breached the provisions of the *Public Procurement and Disposal Act* basically stating that it did not promote competition and fair treatment of competitors. It alleged that exhibit "MW 3" is defective and should not be relied upon by the court. It gave various reasons which frankly are matters that should be gone into at the hearing of this suit in due course.

11. As regards the principle of showing harm as per the **Giella** case, the Plaintiff submitted that in the absence of the first and/or second Defendants not indicating that they would be ready and willing to pay the said sum into court, it would suffer irreparable harm. The Plaintiff would seem to be saying that where the court is of the view that the defendants will not be in a position to compensate the plaintiff (presumably because they have not offered to do so) an interlocutory injunction should be granted. Thereafter I was referred to the case of **Doonholm Rahisi Stores v Barclays Bank of Kenya Ltd and another (2006) eKLR.** That was a case as submitted by the Plaintiff, that the issue for determination was whether an appeal would be rendered nugatory if the interim injunction was not granted. The Plaintiff maintained that it would suffer irreparable harm if the commission that the Plaintiff would have earned on the policies was paid out by the second Defendant to an entity other than the Plaintiff. If further went on to say that the second Defendant had not shown that it will be readily able to meet the Plaintiff\'s claim should this suit succeed. Finally, on the balance of convenience point, the Plaintiff stated that that it had demonstrated its case with a probability of success. It was also quite clear from the Defendants\' affidavits in reply that neither of them would be ready and willing to compensate the Plaintiff should it succeed at the conclusion of the case. The Plaintiff went on to say that even assuming that the court was to decide this matter on a balance of convenience, it submitted that the balance tilts in favour of the defendant for the reason that the most convenient step to take is to maintain the status quo until the case is heard and determined. I was referred to the Ruling of **Njagi J.**in **Helga Hahmann v Charles Mumba Mwagadi (2008)eKLR** to this end.

12. The first Defendant filed its submissions in relation to the application on 4 May 2012. It identified the following issues: –

(a) whether the invitation for quotation is a binding contract between the Plaintiff and the first Defendant;

(b) whether or not the Plaintiff/Applicant\'s rights have been infringed;

(c) whether the Plaintiff/Applicant has established a prima facie case, where damages will not be an adequate remedy in the unlikely event the Applicant is successful and lastly, in whose favour does the balance of convenience tilt;

(d) the upshot.

With regard to the first issue, the first Defendant admitted that it had placed an advertisement inviting applicants to tender for the supply of various goods and services including insurance brokerage services. In response to the invitation, the Plaintiff had submitted its bid and was prequalified and placed in the panel of insurance brokerage firms that had met the specifications of the first Defendant. The process of tender was open to the entire public. The Plaintiff was informed of his pre-qualification. In the first Defendant\'s opinion this meant that the tender process as per the provisions of the Public Procurement and Disposal Act was compliant. The first Defendant continued by stating that once prequalified, the Plaintiff, along with the other pre-qualified brokers, was invited to make quotations for policy placement as and when the need arose. The first Defendant invited the Plaintiff to quote for the policy placement for the insurance of Fire and Peril, Motor Vehicle Comprehensive and Private and no more, as is evidenced by the first Defendant\'s letter dated 19 December 2011. Further, the first Defendant pointed out that the request for insurance quotation detailed as exhibits "CKM 3" and "CKM 13" clearly singled out the policy covers for which the Plaintiff was invited to make a quotation. However, the Plaintiff went out of its way and submitted quotations for each and every category of insurance well beyond what it was invited to submit as per the Quotation. The first Defendant stressed that the pre-qualification of the Plaintiff meant that it could be called upon to quote for policy placement from time to time which quotations could either the accepted or declined. The court was referred to the case of*HCC C No. 39 of 1999,* **Pius Nyambane t/a Pimers Agencies v Kenya Post Office Savings Bank** as per **Mbaluto J.** The first Defendant detailed that the invitation to the Plaintiff by it, was an invitation to treat wherein the Plaintiff made an offer which the first Defendant did not find acceptable. This invitation to treat is a contract regulated by the principles of contract and is not a tender within the meaning of the *Public Procurement and Disposal Act,* owing to the fact that the first Defendant had already conducted its pre-qualification exercise. The first Defendant maintained therefore that there was no contract between the Plaintiff and the first Defendant capable of enforcement or at all.

13. The first Defendant continued with its submissions by saying that there was no contractual obligation on the part of the first Defendant to award to the Plaintiff any of its work. For the Plaintiff to seek injunctive relief, it has to satisfy this court that there had been an infringement of that right and the probability of success of the Plaintiff\'s case at the trial. The first Defendant then set out the various grounds of the application. In going into details, the first Defendant stated that such clearly depicted that the Plaintiff had no right in law or fact in respect to all or any of the first Defendant\'s work. The Plaintiff had not suffered any infringement of a right to warrant the granting of an interlocutory injunction. It could not seek insurance premium commissions for work that it was not given to do. It does not have a right capable of enforcement by way of injunctive relief as sought in the application. The court was referred to the case of **Unlimited Dimension Company Limited v Moffat Muihuri & Anor. (2007) (Nyeri) eKLR** where the court had made a finding that a mere expression of interest in the job by a plaintiff and the bills of quantities upon which both parties endorsed their signatures, were mere quotations and did not constitute a contract. This finding was also emphasised in the case of **WWW Bid Investment Company Limited v Tausi Assurance Company Limited** *HCCC No. 866 of 2009***.**

14. With regard to the Plaintiff establishing a prima facie case as per the guidelines of **Giella**, the first Defendant referred me to the definition of such in the case of **Mrao Limited v First American Bank of Kenya Limited & 2 Ors (2003) eKLR 125.** In that case, I was detailed that a prima face case required an applicant to show more than just an arguable case, that the evidence must show an infringement of a right and the probability of success of the applicant\'s case at the trial. The first Defendant reiterated that as there was no contract between the Plaintiff and itself, no such obligation could flow. In any event, the first Defendant maintained, that for the Plaintiff to be entitled to any commission, it has to be for work done and there must be an agreement to that effect with the concerned insurance company with whom the placement work was done. The significant paragraph in this respect, as identified by the first Defendant, was the allegation that the first and second Defendants used the Plaintiff\'s bid to prepare the second Defendant\'s bid in order to deny the Plaintiff the resultant insurance commission. The first Defendant maintained that this allegation was false and made in bad faith. The request for quotations was done at the same time to all the prequalified firms. The second Defendant was invited to quote for different policies from those that the Plaintiff was invited to quote for, hence such allegations are scandalous and devoid of

any merit. Finally, the first Defendant submitted that it was a reputable solid cooperative society well able to pay the money as claimed in commission by the Plaintiff in the event that it be successful in its suit. It further submitted that the Plaintiff had in fact liquidated its claim in monetary terms. This action clearly showed that it was unlikely to suffer any irreparable damage not capable of redress by way of damages. The first Defendant submitted that the balance of convenience clearly tilts in favour of the first Defendant who had a need for placement of the insurance policies. It had already placed various policies with successful prequalified firms.

15. The second Defendant filed its written submissions to the application on 4 July 2012. It set out a brief synopsis of the facts in the matter and then turned to the question of the law. It submitted that the application does not meet the requirements for the grant of an interlocutory injunction and set out the principles as per the **Giella** case. The second Defendant denied that the applicant had shown a prima facie case as such was premised solely on the fact that it presented quotations which were not met with approval by the first Defendant. It maintained that the first Defendant as the client, had the autonomy to determine which mode of procurement to follow and which insurance broker or underwriter to use. The quotations were submitted at the tender stage and a tender does not in any way amount to a contract. The Plaintiff was not successful in its quotation and consequently on what basis could it lay a claim for commission? The Plaintiff had not shown the infringement of any right or, in the second Defendant\'s opinion raised any tangible issues and consequently there existed no likelihood of success upon trial. The second Defendant wondered why the Plaintiff was relying upon a purported breach of the Public Procurement and Disposal Act without giving any explanation as to why it had not chosen to invoke the appeals process thereunder. The second Defendant then referred the court to*Civil Appeal No. 84 of 2010,* **Republic v National Environmental Management Authority** in which the **Court of Appeal** has found that especially where Parliament has provided a statutory appeal procedure it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and to ask itself as to what was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. The second Defendant submitted that in the circumstances there was absolutely no cause of action which had been disclosed as against it and, in its view, the Plaintiff\'s suit had no chance of success. It maintained that the Plaintiff had failed to show a prima facie case with the possibility of success and thus failed at the first hurdle in the test for an interlocutory injunction under the **Giella** principles. As for the second principle of whether the applicant will suffer damage that cannot be compensated by way of damages, the second Defendant submitted that the claim itself was clearly computed and is a pleaded monetary claim of Shs. 12,009,083.10 together with a prayer for interest at 18% per annum from 1 January 2012 until payment in full. As such, the second Defendant maintained that damages in the amount of the same sort would sufficiently cover the Plaintiff. Further, the second Defendant submitted that on the question of balance of convenience such need only be addressed where the court is in doubt. In this case, it submitted there was no doubt that the applicant had failed in satisfying the first two grounds for the grant an injunction. The second Defendant requested that the application ought to be dismissed with costs.

16. I have carefully perused the 2 Affidavits in support of the application before me, as well as the 2 in opposition thereto. For an interlocutory injunction to issue as prayed by the Plaintiff, I have first of all to be satisfied that the Plaintiff has made out a prima facie case with a probability of success. In this matter, I don't consider that the Plaintiff has come anywhere near satisfying that requirement. From the admitted facts, in response to the first Defendant's request, the Plaintiff applied for pre-qualification to able to tender as an insurance broker (there were others) for the first Defendant. It was successful in so pre-qualifying always bearing in mind that it had been carrying out broking duties for the first Defendant in 2101 and 2011. I accept the statement made by Mr.Ojall that the meaning or process of pre-qualifying was so that the first Defendant could call upon its panel of brokers at any time to place insurance required for the first Defendant's activities, at any time. Be that as it may, it appears that some, if not most, of the first Defendant's insurance placement was to take place at the beginning of 2012. It appears that this requirement/activity on the first Defendant's part, was thought about and actioned rather late in 2011, November to be precise as per the Tender for Prequalification exhibited as "CKM 1" to the Supporting Affidavit of Mr. Macharia. That document required suppliers of (not only) insurance broking services to apply for pre-qualification by 18th November 2011. No evidence was presented before Court as to exactly when or how the Plaintiff was informed that it had attained the pre-qualification status.

17. However, what is pertinent is that the first Defendant wrote not only to the Plaintiff but, presumably, other insurance brokerage firms that had been pre-qualified asking for quotations for insurance covers to be placed. The letter pertinent to the Plaintiff was the one dated 19 December 2011signed by Mr. B. M. Rondo, the first Defendant's Ag. Chief Executive Officer and exhibited to the Affidavit in support of the Application as "CKM 2". That letter quite clearly asks the Director of the Plaintiff company to quote for the Fire and Perils, Motor Vehicle Comprehensive and Private policies from the underwriters. What is apparent from the Affidavit in support of the Application was that this was a terrible disappointment to the Plaintiff for it was obviously handling, at least for 2010 and 2011, a much larger portfolio of insurance covers than it was now being asked to provide/quote for. However, this did not deter the Plaintiff from obtaining details of the Loan Guard Policy from the second Defendant "as the holding broker". Obviously, the second Defendant having been requested such by the brokers that it had been used to dealing with, supplied the renewal details for that policy by its letter dated 20 December 2011 addressed to the Plaintiff ("CKM 4").

18. The salient paragraph of the Affidavit in Support of the Application is paragraph 7. Having received the letter from the first Defendant dated 19th December 2011asking the Plaintiff only to quote on premiums for 2 policies, Fire and Perils and Motor Vehicles Comprehensive and Private, the Plaintiff then managed to lay its hands on the schedule being the Request for Insurance Quotation for all the first Defendant's insurance requirements, history doesn't relate quite how. However, the Plaintiff took it upon itself to obtain quotes from the second Defendant for all such requirements as detailed in the 3rd paragraph of its advocates' letter to the Chief Executive Officer of the first Defendant dated 6 January 2012. That letter comprised a demand that the first Defendant do award the placement of the entire portfolio of insurances required to be placed for the it, with the Plaintiff. It also contained threats as to unfairness, lack of transparency etc. in the tendering process. I ask myself as to just what tendering process was the Plaintiff referring to? In my view, this was a complete try-on by the Plaintiff to scare the first Defendant into giving it more business and thus entitle the Plaintiff to higher commission earnings. There never was any contract as between the Plaintiff and the first Defendant. To my mind, the pre-qualification exercise was just that, an exercise conducted by the first Defendant to establish its panel of insurance brokers. As such exercise, that was the tendering process to which the provisions of the Public Procurement and Disposal Act may have applied. However, the Plaintiff had no quarrel with the first Defendant as regards that process as it was prequalified. The first Defendant then followed up by asking the brokers on its panel, including the Plaintiff, to give it quotes for premiums for various classes of insurance cover. This, to my mind, was an invitation to treat, an invitation to the Plaintiff to make an offer as regards premiums for 2012 for the two aforementioned policies. The Plaintiff responded not just by detailing premiums for the two policies but for the whole portfolio as per the Schedule enclosed with its advocates' said letter of 6 January 2012. The first Defendant never accepted that offer. A contract never came into existence as between the Plaintiff and the first Defendant.

19. I am supported in such finding by the **Pius Nyambane** case (supra) and to an extent by the two other cases cited to me by the first Defendant being the **Unlimited Dimension** and **WWW Bid Investment** cases (both supra).In the **Pius Nyambane** matter **Mbaluto J** included in his Judgement an extract from **Halsbury's Laws of England, 3rd Edition, Volume 8 at page 71** as follows:-

"an advertisement inviting tenders for the supply of goods extending over a period of time is not an offer, but an invitation for offers. A tender for the supply of such goods as may be required, no quantity being specified, is not an offer which may be accepted generally so as to form a binding contract, but is a continuing offer, which is accepted from time to time whenever an order is given for any of the goods specified in the tender. An acceptance of such a tender merely amounts to an intimation that the offer will be considered to remain open during the period specified, and that it will be accepted from time to time to time by orders for specific quantities, and does not bind either party unless and until such orders are given".

The position is similar in this case, save that I am of the opinion that there was no tender here. The first Defendant asked for quotations for insurance premiums, there was no tendering process. It was purely, as the extract from **Halsbury's** has it: **"an invitation for offers"**. The acceptance of such offers would be considered to remain open during the period specified (2012) until it would have been accepted by the

first Defendant. Reverting therefore to the first principle as expounded in the **Giella** case, I am not satisfied that the Plaintiff herein has put up a prima facie case with a probability of success, taking into account the definition of such as detailed in the **Mrao Limited** case (again supra). Even if I were so satisfied, I must necessarily agree with the submissions of both Defendants that what the Plaintiff has done in its Plaint is to plead a monetary claim and even put a figure on what it says it would have lost in not receiving commissions. I can see no merit in the Plaintiff's submission that the reluctance of the Defendants in not being ready and willing to pay the claimed sum of Shs.12,009,083/10 would lead to irreparable harm to be suffered by the Plaintiff should an interim injunction not be granted herein. There is no doubt in my mind that the Plaintiff can be compensated in damages if it succeeds at the hearing of this case, in due course. Having found such, there is no need for this court to decide this application based on the balance of convenience.

20. The conclusion to all the above is that I dismiss the Plaintiff's Application by way of Notice of Motion dated 24th January 2012 with costs to the Defendants.

DATED and delivered at Nairobi this 25th day of July 2012.

J. B. HAVELOCK
JUDGE