



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

Civil Case 534 of 2007

CO-OPERATIVE INSURANCE CO. LTD.....PLAINTIFF
VERSUS
FAIRSURE INSURANCE BROKERS DEFENDANT

RULING

1. The Plaintiff filed the Chamber Summons dated 15th August 2008 seeking for the defence filed on 4th July 2008 be struck out and judgment be entered against the defendant for sum of Kshs.3,871,859.00 in the alternative, the applicant sought for an order that judgment be entered for the plaintiff against the defendant in the sum Kshs. 448,823,00 being the sum admitted with interest and cost and the balance of claim be determined at the hearing. This application is supported by the grounds on the body thereto as well as the supporting affidavit of **Joseph Katiku** sworn on 15th August, 2008 and another replying affidavit sworn on 31st October, 2008.

2. According to the Plaintiff, the defendant owes the plaintiff a sum of Kshs.3.871,859.00 in unremitted premiums in respect of insurance policies issued to Balozi Sacco Limited. After this suit was filed the plaintiff paid a sum of Kshs.200,000/= on 18/10/2007 on account but the balance remains unpaid. It is further claimed that on 17th January, 2007 the plaintiff issued a cheque of Kshs.500,000/= as part payment of the outstanding debt but the cheque was dishonored upon presentation to the bank for payment. It is further alleged that by a letter dated 17th October, 2007, the defendant admitted owing the plaintiff a sum of Kshs.448,823.00 which the defendant promised to settle in two weeks but has never done so.

3. Counsel for the plaintiff urged the court to find that there is no defence raising triable issues; the so called defence is a mere denial. Moreover, in view of the admission by the defendant that a sum of Kshs. 448,823.00 would be paid in two weeks, and the issuance of a bounced cheque clearly shows the defence does not raise triable issues. Going by the correspondence exchanged between the Plaintiff and the Defendant, they clearly indicate that there was a relationship over insurance and a broker between the two parties. Under section 156 of the Insurance Act, the broker was supposed to remit the premiums collected within sixty days. Counsel further urged the court to find there is admission through a letter that was addressed to the plaintiff. According to the provisions of order XII rule 6 of the Civil Procedure Rules the admission can either be in the pleadings or otherwise.

4. This application was opposed. Counsel for the respondent relied on the replying affidavit by **Nelson Omolo** sworn on 15th October 2008 and a further affidavit sworn on 21st November 2008. Firstly, it is denied that there exists a privity of contract between the plaintiff who is an insurance company and the defendant who is a broker in regard to payment of premiums. The broker is merely an agent of the insured and if there is a breach of contract the insurance should pursue the insured. There is a defence on record which was filed after this court granted leave. The court that granted leave to defend the suit assessed it in the draft form and found that it raises triable issues thus the defendant was granted leave to defend the suit. The allegations by the plaintiff are denied and to show there are triable issues, this particular application, there are five affidavits sworn by both parties which are an indication that the matter is highly protracted and should therefore proceed to a hearing. Counsel urged the court to dismiss the application as the sum claimed was paid to the plaintiff.

5. The primary issue for determination in this application is whether the defence raises triable issues. Secondly and in the alternative, whether the plaintiff is entitled to a partial judgment for the sum of Ksh.448,823 which they claim was admitted. In the case **of Gurbaksh Singh & Sons Ltd vs. Njiri Emporium Ltd (1985) KLR 695** Kneller JA, Platt & Gachuhi Ag. JJA held:-

“2. Summary judgment should only be Entered where the amount claimed Has been specified, is due and Payable or has been ascertained or Is capable of being ascertained as A mere matter of arithmetic.

6. A liquidated claim is one that needs no further inquiry

as to how much ought to be claimed.

7. *A sum does not become liquidated just because it is claimed but only if it is agreed or events on which it is based reveal it can be calculated independently of the sum claimed.*

6. The plaintiff's claim although liquidated is based on several accounts which the plaintiff claims to have had with the defendant. The defendant denies the existence of these accounts save for Barozi Sacco Society limited which the defendant alleges to have settled after the suit was filed. I think to determine the plaintiff's claim effectively it is necessary to call oral evidence to enable the parties give evidence through the court room processes which will entail production of documents, examination and cross examination.

7. On the alternative prayer there is a letter dated 17th October 2007 written by the defendant to the plaintiff in which the defendant stated that a cheque of Ksh.448,823.00/- would be paid in two weeks time. The defendant has not shown that the said money was paid. Accordingly, I would enter partial judgment in favour of the plaintiff for the sum of Ksh.448,823.00/- with interest and costs. The balance of the plaintiff's claim will proceed for hearing. The plaintiff will also have the costs of this application.

RULING READ AND SIGNED ON 29TH JANUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE