

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 846 of 2009

UNIVERSAL MARKETING INSURANCE AGENCIES LTD PLAINTIFF

VERSUS

CFC LIFE ASSURANCE LIMITED..... DEFENDANT

RULING

1. By a Plaint filed on 18th November 2009, the Plaintiff is seeking for a sum Kshs.3,485,800.00 being special damages for a breach of contract. By a Chamber Summons filed on the same date, the Plaintiff seeks for an order of injunction to restrain the Defendant through its agents, employees or servants from paying the monies being claimed by the Plaintiff to any other person until the determination of this suit. The Plaintiff is also seeking for the sum Kshs.3,485,800 being the commission to be paid by the Defendant forthwith. This application is premised on the grounds that the plaintiff was appointed a commission agent for purposes of soliciting and sourcing for insurance business for the defendant.

2. Sometimes in June 2009, the Plaintiff applied to Population Services International (PSI) for pre-qualification as possible suppliers for medical insurance. The Plaintiff then approached the Defendant so that they could do a joint tender, and indeed the Defendant confirmed that the Plaintiff was acting on their behalf. On 28th July 2009, the Plaintiff together with the Defendant presented the proposal for medical insurance and they were awarded the tender.

3. However, PSI wanted the Defendant to work with a different broker who never tendered for the work or participated in the pre-qualification. The Defendant was therefore denied the benefit of the commission for the medical insurance which he had solicited. The Defendant brought in a new agent as per the demand of **PSI** who are about to be paid the commission. The Plaintiff's company is gravely aggrieved by the turn of events which goes against the principals of agency relationships and fairness. The plaintiff therefore sought for the above orders.

4. This application was opposed by the Respondent, they relied on the affidavit sworn by Musili Kivuitu on 30th November 2009. According to the respondent, it is not disputed that the Plaintiff and Defendant entered into an Agency agreement in which the Plaintiff was obligated to socialite and remit

insurance business to the Defendant. That agreement was however in very general terms and did not just apply to the business of PSI. Even if the Plaintiff responded to the invitation to tender and made presentations, there was nothing to show their application was accepted. Both the Defendant and Plaintiff made a joint tender in which the applicant was applying to be made a broker while the Defendant sought to be appointed as Underwriter. The Respondent was successful in its bid and was appointed as an Underwriter, however the applicant was unsuccessful and was not appointed as a broker. The tender for insurance brokerage services was awarded to Chancery Insurance brokers who are also not party to this proceedings.

5. Under the policy document, the Defendant was obligated to pay commission to the appointed brokers and the commission has already been paid. Counsel for the Defendant further submitted that a joint tender does not entitle the parties to the business as it depends on who was appointed by Client. On the points of law, the application has not met the threshold for granting the mandatory orders sought for reasons that, the orders have been overtaken by events, the commission has already been paid to the successful broker, and the evidence of payment is demonstrated in the replying affidavit. Thus the Plaintiff's case does not meet the requirements from granting an order of injunction as set out in the case of *Giella vs Cassman Brown*. The Plaintiff has not demonstrated a prima facie case with a probability of success. Moreover, the Plaintiff's case is a money claim which is liquated and can easily be compensated for in damages. Lastly, the application which seeks for mandatory orders cannot be brought by a way of chamber summons.

6. The above is the summary of the salient issues brought out in the pleadings and rival submissions. Firstly the competence of this application is challenged because it seeks for a mandatory orders by way of a chamber summons. It is trite that an interlocutory mandatory order can be sought under the provisions of Section 3A of the Civil Procedure Act, but the procedure is as provided for under Order 50 of the Civil Procedure Rules which is by way of a notice of motion. As it was held in the case of *Morris & Co Ltd vs Kenya Commercial Bank & Another* [2003] eKLR Vol.2 Ringera J, (as he then was) held that:

“where the Plaintiff sought both interlocutory prohibitive and mandatory injunctions it was incumbent on him to do so in a motion on notice, for under our procedural law it is established that where a mater partly falls within the scope of a summons in chambers and partly within a motion on notice, the large procedure, namely, the motion, is to be

invoked.”

7. On the merit of the application, the Plaintiff’s claim is for an alleged breach of contract which is a specific claim for money and general damages. The Defendant has put up allegations that the plaintiff was never appointed as an insurance broker although they had done a joint tender. PSI had the discretion as the client to appoint the broker, and Chancery Insurance Brokers were appointed. The Plaintiff’s claim is for a liquidated sum which if proved can be compensated for, for damages. It is trite that an injunction should not be granted where it cannot be enforced or where it will be ineffective for practical purposes. In this case the Defendant claim that the commission has already been remitted to Chancery Insurance Brokers and more fundamentally Chancery Insurance Brokers and PSI are not parties to this suit. For the aforesaid reasons I find the Plaintiff’s application is not only incompetent but lacks merit and it is hereby dismissed with costs.

RULING READ AND SIGNED ON 23RD APRIL, 2010 AT NAIROBI.

M. K. KOOME
JUDGE