REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL SUIT 890 OF 2002

GATEWAY INSURANCE COMPANY LIMITED……..PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL……..DEFENDANT

J U D G M E N T

The Plaintiff Gateway Insurance Company Limited, is a limited liability Company carrying on insurance business here in Kenya. It has sued the Defendant, Nairobi City Council, a Local Authority constituted under the Laws of the Republic of Kenya. The Plaintiff's claim against the Defendant is for a sum of Kshs.27,531,038/= being the balance of premiums for insurance cover provided by the Plaintiff to the Defendant at the Defendant's own request between 1996 and 1999. The Plaintiff also seeks interest of 24% per annum on the said sum.

The Defendant filed a defence in which it denies the allegations in the plaint and also denies that it admitted the alleged debt as pleaded by the Plaintiff. The Defendant also pleads that the claim is statute barred by limitation and that it is bad in law. When the case came up for hearing, the Defendant's Advocate who had been informed of the hearing dates and had even sent counsel to ask for the hearing to be started later; that counsel failed to come for the hearing at the time confirmed by his representative and therefore it proceeded exparte.

The Plaintiff called one witness, Ms. Zaina Rashid Mbonika, the Underwriting Manager of the Plaintiff Company. This witness testified that the Plaintiff Insurance Company was claiming Kshs.27,531,038/- for insurance premiums outstanding for the period between 1996 to 1999. Ms. Zaina produced a schedule and took the court through that schedule to show how the sum claimed was arrived at. At page 30 of the schedule was a policy document for a Money Policy No. 52/03906. It was premium for 1997 in the sum of Kshs.187,770. At page 44 is a premium for a Money Policy for the year 1998 in the sum of Kshs.1,153,292/-. At page 41 is another premium for the year 1999 in the sum of Kshs.1,155,599/. On the latter policy, Ms. Zaina told the court that the Defendant only paid Kshs.596,647 as evidenced by the credit note and that the outstanding sum remains unpaid to date.

Ms. Zaina took the Court through the debit notes which are the invoices for the sum to be paid by the Defendant. In 1997, the total premium due is shown as 7,598,230/-. In 1998, the premium due was Kshs.18,814,739/-. In 1999 the premium due was Kshs.16,354,787/-. The total due for the three years was Kshs.42,767,756/-. Ms. Zaina testified that the total amount received by the Plaintiff Insurance from the Defendant through their broker, JARDINE SASSOON INSURANCE BROKERS, was Kshs.8,332,053/-. That left an outstanding balance which is the total due claimed in this suit, which is Kshs.27,531,038/-. Ms. Zaina produced 16 Policies of Insurance which are the subject matter of the premiums in this case, and took the court through each one of them, step by step. The witness has also produced a letter from the Defendant to the Plaintiff which is at page 23 of the Plaintiff's list of

documents. In that letter, the Defendant requested for all the documents which form the claim in issue in this case. Ms. Zaina also produced a copy of the letter sent to the Defendant enclosing all the documents that they had requested. This letter is at page 26 of the Plaintiff's documents and is dated 20th September, 2002. Ms. Zaina also produced a letter from the Defendant which is page 28 of the Plaintiff's bundle. In that letter the Defendant states that after reconciling all the documents they had received, it came to the conclusion that the outstanding balance due from the Defendant to the Plaintiff was Kshs.27,531,038/-. The letter is signed by the Deputy Town Clerk, Mr. Congo, G.N. Ms. Zaina testified that despite the Defendant's admission of the claim, and despite the acknowledgment of the debt, it has not today paid the Plaintiff Company for the amount due.

The second witness was Robert Kiboro, the General Manager of the Plaintiff Company. His evidence was basically to confirm that the debt in issue was owed by the Defendant to the Plaintiff. He also confirmed that the Insurance policies and Insurance covers in issue in this case were indeed issued to the Defendant by the Plaintiff at the instructions of the Defendant's Insurance brokers. He confirmed that there was a part payment for the policies in issue and that the sum claimed in the Plaint was the outstanding balance.

After the Plaintiff closed its case, it was asked to file submissions and to highlight them on a later date. Eventually the Defendant filed an application, which they later withdrew, in which they are seeking to suspend the filing of written submissions and sought for the recalling of the Plaintiff's witnesses, and permission for the Defendant to call its witnesses to testify. That application was withdrawn and Mr. Amadi for the Defendant instead sought for time to file written submissions in the case, which was granted. Both parties highlighted their submissions on the 20th January 2009. Mr. Munge for the Plaintiff relied on his written submissions. Counsel submitted that the bone of contention between the two parties was the Plaintiff issued insurance covers to the Defendant. Mr. Munge submitted that no evidence was adduced by the Defendant to controvert or rebut the Plaintiff's evidence confirming the issuance of policy covers to the Defendant and that neither was there any challenge raised on the documentary evidence adduced by the Plaintiff. Counsel relied on the **Chatter v. National Bank of Kenya limited CA No. 90 of 1996** where it was held:

"***That a general denial of a claim is not a sufficient defence and that in a suit for a liquidated demand where the facts are clearly set out in the claim, a general denial is of no use and demonstrates not only a reprehensible lack of candidness in the defence but also that the defence discloses no reasonable defence which can be the basis for an application to strike out defence."***

Counsel submitted that the defence as filed was a mere denial. Referring to page 3 of the submissions by the Defendant, in which the Defendant claims that the claims were settled, Mr. Munge submitted that these submissions contradicted the statement of defence filed. Counsel also submitted that the only issue raised by the Defendant in the submissions was that the letters acknowledging the debt were not copied to the Plaintiff. Counsel relied on the case of **Kuruma s/o Kaniu v. Reginald All ELR [1955] Vol. 1 page 236** in which the court held:

"***the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained."***

Mr. Amadi for the Defendant adopted his written submissions. Counsel submitted that since the agent, Jardin Sasson Insurance brokers were not licensed to carry out insurance brokerage for the period between 1996 and 1999, that agent could not have entered into any brokerage agreement with the Defendant. Counsel also submitted that all the claims purported to have been due and owing by the Defendant to the Plaintiff were settled.

I have considered this case together with the evidence adduced by the Plaintiff and the submissions by both counsel. As already stated, the Defendant did not call any evidence, which means that their statement of defence was unsubstantiated and could therefore not be taken into account and further that the Plaintiff's evidence was unchallenged. I note from the submissions filed by the Defendant that the

Defendant went into great length to demonstrate that certain documents which were the Policy Covers forming the Plaintiff's claim were tainted with irregularities. Counsel has listed them in his written submission. Counsel also went further to controvert the evidence of the Plaintiff by making statements in his written submissions which contradicted the evidence adduced by the Plaintiff's witnesses. Mr. Amadi is ill informed. The only way that oral evidence adduced by the Plaintiff could be controverted is through evidence.

Under section 62 of the Evidence Act, it is provided that:

"***62. All facts, except the contents of documents may be proved by oral evidence."***

Section 63(1) of the same Act provides that:

"***63(1). All evidence must be in all cases be direct evidence."***

The only way that the facts adduced in the evidence of the Plaintiff's witnesses could be controverted was by oral or documentary evidence adduced by the Defendant's witness (es) contorverting such evidence. With due respect to Mr. Amadi for the Defendant, the Plaintiff's oral and document evidence could not be challenged through submissions filed by the Advocate for the opposing party. The submissions by the Defendant's Advocate, challenging the propriety, genuineness or otherwise of the documents that were admitted in evidence, and produced by the Plaintiff witnesses, are clearly out of order. They bear no weight and cannot be acceptable as a challenge to the Plaintiff's evidence. As long as the Defendant itself did not adduce any evidence or call any witnesses, the Plaintiff's evidence stands uncontroverted and unchallenged.

The submissions by Mr. Amadi titled 'admissibility of policy documents in evidence' are of no material use to the Defendant. All the statements made under that heading and those made challenging the Policy Covers and Policy documents are statements of facts which ought to have been adduced through oral and direct evidence as required under sections 62 and 63 of the Evidence Act.

The burden of proving this case lies with the Plaintiff to prove that it issued Insurance Policy Covers to the Defendant and that the Defendant has failed to pay the full value for the said service. The Defendant has raised a preliminary point that this suit was time barred and therefore bad in law.

I will deal with the issue of limitation first. The plaint was filed in court on 17th July, 2002. It is not very clear when the cause of action arose but the earliest possible time when it arose was in 1996 when the first Insurance Policy was issued by the Plaintiff to the Defendant. Being an action in contract, under section 4 of the Limitation of Actions Act, the limitation period is 6 years. Section 4 of the Act is however subject to section 3 on the same Act which stipulates:

"***3. This part is subject to Part III. which provides for the extension of the periods of limitation in the case of disability, acknowledgment, part payment, fraud, mistake and ignorance of materials facts."***

The Plaintiff has annexed three letters which it claims are acknowledgements by the Defendant of the debt in issue in this case. For purposes of section 3 of the Limitation of Actions Act, the only letter that the Plaintiff can rely on is the one dated 11th September, 1998. The Defendant's advocate challenged the admissibility of the three letters in which the debt is acknowledged by itself on the basis that none were addressed to the Plaintiff. I am guided by the case of **Kurums S/O Muniu**, supra, that it does not matter where the Plaintiff got the letters. The test is whether they were relevant to the case. I find that these letters are relevant to the case. They were written by the Defendants in regard to the same subject matter in issue in this case. They were not written on a 'without prejudice' basis and can therefore be used in evidence in this case.

The Plaintiff's advocate relies on the following three cases regarding the issue whether these three letters, in which the Defendant acknowledges the debts, are binding on the Defendant.

In **HCCC No. 4342 of 1991 (UR) Kenya Planters Co-Op Union Ltd. v. Mbwanji Limited** a letter written by the Defendant's Managing Director admitting the debt due to the Plaintiff bound the Defendant Company. In the Case of **Fidelity Commercial Bank Ltd. vs. Holiday Investments (K) Limited HCCC No. 971 of 2002** a letter written for and on behalf of 3 Defendant's Managing Director was found to bind all of them. In **HCCC NO. 877 of 2002, Kenya Gatsby Charitable Trust vs. Michael Kamau & 2 others,** it was held that:

"***Admissions can be express or implied either on the pleadings or otherwise, e.g. Correspondence …… They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning."***

Before I consider that letter, I want to quote from **Halsbury's Law of England, 3rd Ed. vol. 24** paragraph 592 on what constitutes acknowledgment.

"***Statutory requirements. Every acknowledgment must be in writing and signed by the person making the acknowledgment, or by his agent. It must be made to the person, or to an agent of the person, whose title or claim is being acknowledged. A person is not an agent for the purpose of making an acknowledgment or part payment unless he is duly authorized to make it. An acknowledgment given by a person who has undertaken the management of the property of a person of unsound mind is of no effect, as there is no agency and no capacity for the manager to act for the person of unsound mind. An infant can make a valid acknowledgment of a debt if the debt is for necessaries supplied to him."***

Section 23 (3) and section 24(2) of the Limitation of Actions Act have codified the requirements that are made under the Halsbury's Laws of England. The two sections deal with acknowledgment and part payment and they stipulate as follows:

"***23. (3) Where a right of action, has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment.***

24. (2) The acknowledgment or payment mentioned in section 23 is one made to the person, or to an agent of the person, whose title or claim is being acknowledged, or in respect of whose claim the payment is being made, as the case may be, and it may be made by the agent of the person by whom it is required by that section to be made."

The Defendant's letter of 11th September, 1998 is addressed to M/s Jardine Sassoon Insurance Brokers and is signed by the Chief Technical Officer of the Defendant's council. It states as follows:

"***RE: OUTSTANDING INSURANCE PREMIUMS***

We are in receipt of your statement dated 31st August, 1998.

We wish to confirm that our indebtness to you is Kshs.26,597,159/45 as tabulated below.

Balance 1997 premiums - Shs. 6439658.40

1998 " - Shs. 20157501.05

Shs. 26597159.45

We are aware this amount should be cleared by end of February each year but the Council's financial position could not allow. We are also aware that there is penalty of 5% per month levied by the commissioner of insurance. Please let us have those charges as soon as you receive them.

This is a very serious situation and the Treasurer is doing everything possible to try and clear this

amount before the end of the year when renewals are due.

We are very grateful for your patience and understanding.

Yours faithfully,"

As already stated, the letter in question was written by the Defendant to an Insurance Broker who was an agent for both the Defendant and also the Plaintiff. This Jardine Brokers was an agent of the Defendant for purposes of obtaining Insurance Policy Covers for the Defendant. They were also agents for the Plaintiff for purposes of getting clients for the Plaintiff for purposes of obtaining insurance covers from the Plaintiff Company. The letter acknowledging the debt in question by the Defendant to Jardine brokers, in my view meets the requirements of sections 3, 23(3) and Section 24(2) of the Limitations of Actions Act. The letter was therefore an acknowledgment of a debt and *inter alia* serves as a postponement of the date of accrual of the cause of action against the Defendant. The Plaintiff's suit was in the circumstances not barred by statute in view of the said acknowledgments.

The three letters are in my view acknowledgments of the debt which is the subject matter in this case. Two of these letters were written before the suit was filed in court. These letters not only service to postpone the limitation period for the filing of the suit but they also serve the purpose of establishing that the Defendant acknowledged that it was indebted to the Plaintiff for the Insurance Covers in issue in this case. At the time that the letter of 11th September, 1998 was written by the Defendant, there had been several correspondences exchanged between the Plaintiff and the Insurance brokers on one hand demanding payment for the money in issue and also between the Defendant and the Insurance brokers demanding for the payment on the one hand and promises of payment by the Defendant on the other. The circumstances under which the letter of 11th September, 1998 was written, it is very clear that the Defendant was acknowledging that it is indebted to their Insurance broker and consequently to the Plaintiff, for the Insurance Policy Covers which are the subject matter of this suit. I find that the Defendant acknowledged the claim for the purposes of section 23(3) and section 24(2) of the Limitations of Actions Act, I find and hold that the Defendant had in effect admitted its liability to pay that which the Plaintiff, who is the creditor is now seeking to recover. Given the circumstances of the case the Defendant has no good defence for the Plaintiff's claim and the Plaintiff is entitled to judgment as prayed. On a balance of probabilities, I am satisfied that the Plaintiff has proved its claim against the Defendant as claimed for in the plaint.

In conclusion I enter judgment for the Plaintiff against the Defendant as follows;

a) In the sum of Kshs.27, 531,038/-.

b) Interest at the rate of 24% per annum from 20th September, 1999 until payment in full.

c) Costs of the suit to the Plaintiff.

Dated at Nairobi, this 20th day of February, 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

N/A for Mr. Munge for the Plaintiff

Ms. Gulenywo holding brief for Mr. Kusero for the Defendant

LESIIT, J.

JUDGE

Order:

There be a stay of execution for 30 days from today.

LESIIT, J.

JUDGE