



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI MILIMANI COMMERCIAL COURTS**  
**Civil Suit 568 of 2005**

**SIFA INSURANCE BROKERS LIMITED..... PLAINTIFF**

**VERSUS**

**A.I.G. KENYA INSURANCE LIMITED..... DEFENDANT**

**JUDGMENT**

The plaintiff filed suit against the defendant seeking judgment to be entered in its favour for the sum of KShs.7,018,505.80 on account of various commissions, particularized in the plaint, that it claimed is owed to it by the defendant. The defendant filed defence admitting having dealt with the plaintiff in the course of its business. It however denied owing the sum claimed by the plaintiff in the plaint. While admitting that it at one time owed the plaintiff certain sums on account of commissions, the defendant averred that it had offset the said commissions due to the plaintiff to settle other sums owed to it by the plaintiff and its associate companies. It denied that it was liable to pay the sum claimed by the plaintiff and urged the court to dismiss the plaintiff's suit with costs.

At the hearing of the case, the plaintiff called one witness PW1 Paul Gogo, its managing director. On its part, the defendant

called one witness, DW1 Victoria Miseda, its officer in-charge of credit control. The undisputed facts of the case are as follows: the plaintiff is a duly registered insurance brokerage firm. In the course of its business, the plaintiff brokered certain insurance business for the defendant. The defendant admitted that it dealt with the plaintiff in the course of its business. Although the plaintiff filed suit seeking various commissions allegedly owed to it by the defendant (*which it particularized in its plaint*), at the hearing of the suit the plaintiff abandoned all other claims save for the claim for sum of KShs.628,365/=, KShs.1,994,208.40 and KShs.2,172,465.40 which it claimed as commission on the account of the property sabotage and terrorism insurance policy issued by the defendant to Telkom Kenya Limited and the Aviation, Hull and Liability Policy issued by the defendant to Kenya Pipeline Limited.

According to its plaint, the plaintiff claimed that it procured on behalf of the defendant the property sabotage and terrorism policy No. 0600000025286 for a basic premium of KShs.6,644,905/=. It averred that it was entitled to 20% commission less withholding tax. In its evidence in court, the plaintiff's managing director testified that under this claim the plaintiff was entitled to be paid the sum of KShs.628,365/=. The defendant disputes this assertion by the plaintiff. Its witness testified that although the gross premium payable in respect of the said policy issued to Telkom Kenya was KShs.6,644,905/=: Telkom Kenya Limited had in fact paid the sum of KShs.6,024,028/=. The witness reiterated that Telkom

Kenya had been given a discount and therefore the plaintiff could only be paid its commission on the basis of the amount that was actually paid as premium. The defendant insisted that the plaintiff was entitled to be paid 15% commission and not 20% commission as claimed by the plaintiff. In that regard, on the basis of the premium actually received, it was the defendant's case that the defendant was entitled to be paid KShs.312,732/= as commission. The defendant conceded that it did not pay this admitted amount to the plaintiff allegedly because it had received instructions from the plaintiff that the said sum be utilized to offset the outstanding debt due from the plaintiff to the defendant. The defendant was however not able to produce any documentary evidence to establish that indeed the plaintiff had given such instructions.

The plaintiff testified that it was entitled to a further sum of KShs. 1,994,208.40 as commission on account of the said Telkom Kenya Limited property sabotage and terrorism policy after the said policy was renewed. The plaintiff testified that Telkom Kenya Limited was required to pay the defendant premium of KShs.9,971,042/=. The plaintiff conceded that the premium actually paid to the defendant was KShs.9,068,663/=. The plaintiff's witness explained that Telkom Kenya Limited paid a lesser sum because it was given a discount by the defendant. He however insisted that the plaintiff's commission was not affected by the discount given by the defendant to Telkom Kenya Limited. On its part, the defendant testified that the plaintiff was entitled to be paid 15% commission in respect of the premium of KShs.9,068,663/= actually paid by Telkom Kenya Limited less withholding tax. The defendant testified that the plaintiff was in the circumstances entitled to be paid KShs.473,624/= as commission. The defendant conceded that the said amount was not paid to the plaintiff because the same was applied, on instructions of the plaintiff, to offset an outstanding account. The defendant did not however produce any documentary evidence to support its claim that the plaintiff had issued such instructions for the said commission to be applied to offset an outstanding debt allegedly owed by the plaintiff to the defendant.

The plaintiff averred that it was entitled to be paid the sum of KShs.2,172,465.40 on account of the aviation, hull and liability policy No.070000004 that was issued by the defendant to Kenya Pipeline Company Limited for the gross premium of US\$ 255,738.46. The plaintiff testified that it was entitled to 10% commission on the amount which translated to KShs.1,990,778.40. PW1 testified that he charged interest at KShs.181,687/= thus adding upto the sum of KShs.2,172,465.40. The defendant, while conceding that it had issued the policy in question, was emphatic that the actual premium paid to it was US\$ 201,125.55. It was the defendant's case that the plaintiff was not entitled to be paid this amount because Kenya Pipeline Company Limited had cancelled the insurance brokerage contract with the plaintiff before the policy was issued.

The defendant testified that it had directly issued the aviation, hull and liability policy to Kenya Pipeline Company Limited. The defendant however conceded that at the time the Kenya Pipeline Company Ltd purported to cancel the brokerage of the plaintiff on 4<sup>th</sup> November 2004, the said company had already paid the premium in respect of the insurance cover. The plaintiff further conceded that if a customer made a request that a broker be paid, then the defendant would, in most cases, accept to pay such a broker his commission. The defendant reiterated that the plaintiff was not entitled to be paid any of the sums claimed in the plaint. The defendant urged the court to find that, even if it is established that the plaintiff is entitled to be paid the said commission, the amount should be offset by the sum adjudged in favour of the defendant as against the plaintiff being the sum of KShs. 2,164,502/= in Nairobi CMCC No.1798 of 2003. When the plaintiff's managing director was cross examined by the defendant, he admitted that the plaintiff owed the amount to the defendant. He told the court that he would not mind if the amount decreed by the subordinate court was deducted from the amount adjudged in favour of the plaintiff in this suit.

After the close of both the plaintiff's and the defendant's case, the parties herein agreed by consent to file written closing submissions. The plaintiff and the defendant duly filed the said closing submissions. After evaluating the evidence adduced in court, and after evaluating the facts and the law as disclosed in written closing submissions, the issues for determination by the court are as follows:-

(i) *Whether the plaintiff established its case that it is entitled to be paid commission on account of the insurance policies that were issued by the defendant to Telkom Kenya Limited and Kenya Pipeline*

*Company Limited?*

(ii) *If a finding is reached that the defendant ought to pay the plaintiff the said commission, what is the rate of commission that should be applied and what amount, if any, ought to be paid to the plaintiff?*

(iii) *Whether the defendant established a case to entitle this court offset the entire amount that may be found to be due and owing to the plaintiff on account of a previous debt owed to the defendant by the plaintiff?*

As regard issue (i), there is no dispute that the plaintiff brokered in the procurement of the two insurance policies to Telkom Kenya Limited and Kenya Pipeline Limited respectively by the defendant. The two policies were the property sabotage and terrorism insurance policy issued by the defendant to Telkom Kenya Limited. The defendant admitted that it issued the said policy and further renewed it for another year. The defendant conceded that the plaintiff was entitled to be paid commission but denied that the plaintiff was entitled to be paid commission at the rate of 20% of the gross premium. According to the defendant, the plaintiff was entitled to be paid commission at the rate of 15% of the actual amount paid as premium. In support of its case, the plaintiff produced a document it claimed was issued by the commissioner of the insurance to regulate the rate of commission payable to brokers by insurance companies. The said document was produced as plaintiff's exhibit No. 2. The defendant did not object to the production of the said exhibit. In the absence of any evidence to the contrary, it is apparent that the rate applicable to an insurance cover under the property sabotage and terrorism policy was 20% of the insurance premium.

Although the plaintiff argued that it ought to be paid commission on the basis of the assessed premium, having evaluated the facts of this case, I am inclined to uphold the position advanced by the defendant that commission should be paid on the actual amount paid as premium (*taking into consideration the discount or rebate that was given by the defendant to the insured*). In the premises therefore, I hold that the plaintiff is entitled to be paid commission at the rate of 20% of the sum of KShs.6,024,028/= that was actually paid as premium by Telkom Kenya Limited for the property sabotage and terrorism policy. The plaintiff is therefore entitled to be paid KShs.568,125/= as commission.

The said policy was renewed. The actual amount paid by Telkom Kenya Limited as premium was KShs.9,068,663/= as opposed to the sum of KShs.9,971,042/= which was assessed as the payable premium. The defendant gave a discount to Telkom Kenya Limited in respect of the said premium. The plaintiff is therefore entitled to be paid commission at the rate of 20% on the actual amount paid as premium. The plaintiff is therefore entitled to be paid commission of KShs.1,723,046/=. The commission payable to the plaintiff has been calculated on the basis that the defendant shall withhold 5% withholding tax on the premium before the 20% premium is paid.

As regard the Kenya Pipeline Company Limited Aviation, hull and liability policy, I hold that the plaintiff is entitled to be paid commission in respect of the said policy. It was the defendant's case that the Kenya Pipeline Company Limited had withdrawn instructions from the plaintiff before the said policy was issued. I evaluated the evidence adduced in this regard. It was clear that when Kenya Pipeline Company Limited purported to withdraw recognition of the plaintiff as its broker, the said company had already paid the premium to the defendant. The plaintiff cannot therefore be denied its premium as it was evident that the plaintiff placed the said insurance cover with the defendant on behalf of the company that was insured. It was the plaintiff's case that it was entitled to be paid 10% commission on the basic premium paid for the policy. The defendant does not dispute that if the court reached a finding that the plaintiff is entitled to be paid premium in respect of the said policy, then the applicable rate to be paid as commission shall be 10% of the actual premium paid. The plaintiff sought to be paid premium on the gross premium that Kenya Pipeline Company Limited was required to pay the defendant. The sum required to be paid was US\$ 255,738.46. According to the defendant, the actual premium paid by the said company was US\$ 201,125.55. The plaintiff is therefore entitled to be paid commission of KShs. 1,707,551.20.

I was not persuaded by the defendant's defence to the effect that it was entitled to offset the

commission due to the plaintiff with other accounts that were then outstanding which had not been settled by the plaintiff. The defendant is not allowed under practice directions issued by the commissioner of Insurance vide his letter dated 5<sup>th</sup> March 2002 addressed to all insurers and insurance brokers. In the said letter (*which was produced as part of exhibits in the bundle produced as plaintiff's exhibit No.1*), the commissioner of insurance outlawed the practice by which insurance brokers and insurers settled balances on account basis without taking into consideration the tenor and spirit of **Section 197** of the **Insurance Act**. I therefore hold that the defendant was not entitled to offset the said commission due to the plaintiff on other accounts maintained by the plaintiff with the defendant. Although the defendant stated that the said arrangement had the consent of the plaintiff, it did not produce any documentary evidence to establish that the plaintiff had given such consent or approval. If the defendant has any claim against the plaintiff, it is at liberty to file an appropriate suit in court for its settlement.

I therefore enter judgment for the plaintiff as against the defendant for the total sums of KShs. 1,707,551.20, KShs.1,723,046/= and KShs.568,125/=. The plaintiff is therefore entitled to judgment for the sum of KShs.3,998,722.20. It was the defendant's case that if any judgment is entered in favour of the plaintiff, then the same should be offset, to the required extent, with the sum of KShs.2,164,502/= that was decreed in favour of the defendant as against the plaintiff in Nairobi CMCC No.1798 of 2003. In his testimony before court, the plaintiff's managing director told the court that he would not be opposed to any sum awarded to the plaintiff by the court being offset with the judgment entered in favour of the defendant in the said suit filed in a subordinate court. I will therefore deduct the said sum of KShs.2,164,502/= from the sum awarded to the plaintiff.

In the circumstances therefore, I enter judgment in favour of the plaintiff as against the defendant for the sum of KShs.3,998,722.20. The said amount shall be paid less KShs.2,164,502/= which was decreed in favour of the defendant as against the plaintiff in Nairobi CMCC No. 1798 of 2003. The plaintiff shall therefore be paid the sum of KShs.1,834,220.20 together with interest at court rates from the date of filing suit until payment in full. The plaintiff shall be paid the costs of the suit.

**DATED at NAIROBI this 17<sup>th</sup> day of APRIL, 2009.**

**L. KIMARU**

**JUDGE**