



**REPUBLIC OF KENYA**

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

**Civil Case 716 of 2002**

**APOLLO INSURANCE CO. LTD.....PLAINTIFF**

**VERSUS**

**THABITI INSURANCE BROKERS LTD.....1<sup>ST</sup> DEFENDANT**

**DALMAS OTIENO.....2<sup>ND</sup> DEFENDANT**

**J U D G E M E N T**

The Plaintiff Apollo Insurance Co. Ltd filed suit against Thabiti Insurance Brokers ltd and Dalmas Otieno jointly and or severally for a sum of Kenya Shillings 7,806,485.50 in respect of premiums due and owing to the Plaintiff. The Plaintiff averred in the Plaint that the 1<sup>st</sup> Defendant is a broker and the 2<sup>nd</sup> Defendant was at all material times the principal Officer thereof within the meaning of the Insurance Act Cap 487 of the Laws of Kenya. The Plaintiff further averred in the Plaint dated 10<sup>th</sup> June 2002 and filed in court on the same date that between the 1<sup>st</sup> day of January 1998 and the 31<sup>st</sup> day of December 2001 the first Defendant transacted insurance business on behalf of the plaintiff. That the Plaintiff in consideration of paying the 1<sup>st</sup> Defendant a commission for all businesses introduced to it by the 1<sup>st</sup> Defendant provided insurance services and assumed risks for the business placed with it by the 1<sup>st</sup> Defendant. That the 1<sup>st</sup> Defendant on its part collected premiums from the Plaintiff's insureds for onward transmission to the plaintiff. The Plaintiff further again avers that the 1<sup>st</sup> Defendant collected premiums of ksh.7,806,485.50 net of commissions payable to the Plaintiff by the 1<sup>st</sup> Defendant. That the 1<sup>st</sup> Defendant failed refused and/or neglected to remit such premiums to the Plaintiff. The Plaintiff continues and avers that it agreed with the 2<sup>nd</sup> Defendant that the said 2<sup>nd</sup> Defendant would account and be responsible for all the premiums collected by the 1<sup>st</sup> Defendant on behalf of the Plaintiff. The Plaintiff pleads in the alternative and without prejudice to the earlier pleading that the 2<sup>nd</sup> Defendant is liable under the insurance Act Cap. 487 Laws of Kenya being the principal Officer of the 1<sup>st</sup> Defendant and having failed to discharge satisfactorily the duties and functions of his office to ensure that the premiums were paid over to the Plaintiff. That there have been meetings between the Plaintiff and the 2<sup>nd</sup> Defendant and that despite promises by the 2<sup>nd</sup> Defendant no payment of the premiums has been made and so the Plaintiff brought the suit praying for judgment for the payment of the sum of Ksh.7,806,485.50 being the premiums received by the 1<sup>st</sup> Defendant on behalf of the Plaintiff but not remitted to the Plaintiff and for interest on the said amount of Ksh.7,806,485.50 at the rate of 2 ½ per centum per month from 1<sup>st</sup> January 2002 until it is paid in full. The Plaintiff also prays for the costs of the suit together with interest.

The Defendants filed a Statement of Defence dated 5<sup>th</sup> July 2002 and stamped with the Court stamp on 12<sup>th</sup> July 2002. In it the Defendants deny that the 2<sup>nd</sup> Defendant has ever been the Principal Officer of

the 1<sup>st</sup> Defendant and was therefore wrongly joined in the suit and put the Plaintiff to strict proof. They further aver in the alternative in the said statement of Defence that the Plaintiff loaded onerous and unlawful non-contractual interest penalties and other illegal charges on the 1<sup>st</sup> Defendant's account and has neglected/omitted and/or refused to render any or any proper and accurate account to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant further averred that it had a running account with the Plaintiff and that the Plaintiff had failed to account or give credit to it for premiums paid to the Plaintiff directly by policyholders on business placed by the 1<sup>st</sup> Defendant or to show the accurate record of all payments made by the 1<sup>st</sup> Defendant to the Plaintiff despite request. The 1<sup>st</sup> Defendant further averred that Plaintiff, contrary to the usual practice within the insurance industry, charges illegal, unreasonable unfair and non-commercial rate of interest not in accordance with any agreement with the 1<sup>st</sup> Defendant or any law and charging penalty interest is illegal. The 1<sup>st</sup> Defendant finally averred that all premiums collected by it were remitted to the plaintiff and where it failed to collect premiums then it advised the plaintiff to cancel the relevant policies but failed to raise the relevant credit notes in favour of the 1<sup>st</sup> defendant. That the Defendants could not comply with the demand to pay as such demand was based on a spurious factual and legal basis. The Plaintiff filed a Reply to Defence in which it denied the allegations in the Defence and put the defendants to strict proof and prayed that the Defence be struck out and judgment be entered as prayed in the Plaintiff.

At the hearing of the suit the Plaintiff called one witness. PWI Michael Kabiru sworn testified that he was employed as an Accountant by the Plaintiff. His testimony was that the Defendants were indebted to the plaintiff in the sum of Ksh.7 806 485.50 as premium collected by the Defendants and not remitted to the Plaintiff. He produced as plaintiff's Exhibit No.1 the statement of account and a summary list of the insureds procured by the 1<sup>st</sup> Defendant. His further testimony was that in that statement the plaintiff had credited the Defendants with their Commission of Ksh.2,375,633 leaving the sum of Ksh.7,806,485.50 due to the plaintiff as premium. PWI then produced the policies in respect of some thirty six (36) insureds whose premium is the subject matter of the suit. The policy includes the proposal form, the policy document which is the contract document and the debit note showing the premium payable. These became Plaintiff Exhibit 2. His further testimony was that the Plaintiff sent to the Defendants a demand letter dated 29<sup>th</sup> April, 2002 to which no reply was received by the plaintiff. That letter was produced in evidence and marked plaintiff Exhibit 3. He further added that the statement showing how much the plaintiff was claiming from the Defendants was sent to the Defendants 1<sup>st</sup> by the Plaintiff and later by its Advocates before suit was filed but no responses were received. He then prayed to court to enter judgment as prayed and interest on unpaid premiums.

The Defendants did not attend court on the date that the suit was fixed to be heard. Their Advocates on record also failed to attend. There is on record an Affidavit of Service attached to which is a Hearing Notice stamped and signed for Ocharo & Co. Advocates who are on record for the Defendants herein.

At the close of the plaintiff's case counsel appearing for the plaintiff submitted that he relied entirely on the evidence of the witness. He submitted that the case had been proved to the prescribed standard and the plaintiff had produced the relevant supportive documentary evidence which evidence is unchallenged. He prayed that judgment be entered as prayed in the plaintiff.

The Plaintiff's evidence is uncontraverted. On going through the documents produced in evidence I find that there were various types of insurance covers involved. There was Private Motor Policy, Commercial Motor Policy, Electronic equipment cover, Burglary money, Fidelity Guarantee, Fire and Perils, Group Personal Accident Policy and Domestic Package. The names of the thirty six insureds both individual and corporate insureds are given. The statement of account produced in evidence clearly shows the amount shown on the plaintiff as the amount of premium in respect of the various insureds. There is also a letter dated 1.7.2002 in the bundle of documents produced as Exhibit No.1 which proves part payment of the premiums leaving the balance as sought in the plaintiff. The policy documents produced in evidence are complete in detail as to premium payable, excess, endorsements, and other heads.

Taking into account the entire facts and circumstances of this case and the fact that the defendants chose not to counter the plaintiff's evidence it appears clear to me that the plaintiff has proved its claim as in the plaint prayed. I further hold that the plaintiff is entitled to the costs of the suit and interest as prayed in the plaint. There will therefore be Judgment for the plaintiff against the defendants jointly and/or severally for the sum of Ksh.7,806,485.50 and interest thereon at the rate of 2½ per month from 1.01.2002 until payment in full and costs of the suit.

It is so ordered.

DATED and DELIVERED in open court in Nairobi this **17<sup>th</sup>** day of **April, 2008**.

In the presence of Matheka holding brief for Mr. Mwangi for Plaintiff.

**P. M. MWILU**

**JUDGE**

**17.04.2008**