



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Suit 460 of 2007**

**SIFA INSURANCE BROKERS CO. LTD.....PLAINTIFF**

**-VERSUS-**

**MASENO UNIVERSITY.....DEFENDANT**

**R U L I N G**

This is a notice of motion brought by the plaintiff under the provisions of **Order XXXVI Rule 1** of the **Civil Procedure Rules**. The plaintiff seeks summary judgment to be entered against the defendant for the sum of Kshs.5,437,478/= together with interest thereon as prayed in the plaint until payment in full. The grounds in support of the application are on the face of the application. The plaintiff contends that the defendant is truly indebted to it to the said sum of Kshs.5,437,478/= . It stated that the defendant had no plausible defence to the claim. In its view, the statement of defence filed by the defendant was a sham and consisted of mere denials. The application is supported by the annexed affidavit of Paul Gogo, the Executive Chairman of the plaintiff. He swore a further affidavit on 2<sup>nd</sup> April, 2008, in further support of the plaintiff's application.

The application is opposed. Elizabeth Ayoo, the legal officer of the defendant swore a replying affidavit in opposition to the application. In the said affidavit, she deponed that the basis of the plaintiff's suit i.e. the non-payment of premiums, was untenable since the plaintiff was only entitled to claim his commission from the insurer where he placed the business that he transacted on behalf of the defendant as its insurance brokers. She deponed that the plaintiff's suit did not disclose any liability on the part of the defendant to entitle this court to enter summary judgment as prayed in the application. She deponed that the plaintiff had failed to furnish the defendant with the debits or demand notes from the underwriters to entitle the plaintiff to be paid on account of the said alleged premiums incurred. She further deponed that the plaintiff was purporting to claim premiums in respect of insurance covers which had either been cancelled or on behalf of an insurer who was no longer carrying the business of general insurance. She finally deponed that there was no evidence that the plaintiff had settled any premium on behalf of the defendant in respect of the insurance covers that were allegedly issued to the defendant to entitle the plaintiff to claim the same. She deponed that the defendant had a good defence to the plaintiff's claim and therefore the plaintiff's application for summary judgment should be dismissed with costs.

At the hearing of the application, I heard the rival arguments made by Mr. Ojienda on behalf of the plaintiff and by Mr. Wasuna on behalf of the defendant. Mr. Ojienda reiterated the contents of the application together with the two affidavits filed in support of the application. He submitted that the defendant appointed the plaintiff as its insurance brokers. The plaintiff placed the defendant's insurance business with Pan Africa Insurance Company Ltd. Some claims arose pursuant to the said insurance covers which claims were settled by the insurance company. Mr. Ojienda submitted that the defendant did not pay premiums in respect of the insurance covers upon which the claims which were settled by the insurance company arose. He explained that the defendant had agreed that it would settle the amount after sorting out certain issues.

Mr. Ojienda reiterated that the defendant had acknowledged being indebted to the plaintiff. It was his contention that the demand by the defendant to be availed debit notes from the underwriters was not tenable since the insurance company which had insured the defendant was no longer in business as it had merged with another company. The insurance company in question could not therefore issue the debit notes that the defendant was demanding. He submitted that the plaintiff had settled the premiums in respect of the insurance covers requested by the defendant pursuant to the insurance brokerage contract. Mr. Ojienda submitted that an insurance broker was allowed in law to sue in its own name on behalf of a principal. He explained that since the defendant had not denied that it had benefited from the insurance policies which were issued, especially when claims lodged by its employees were settled, the defendant cannot deny that it owes the premiums in respect of the said insurance policies. He urged the court to allow the application for summary judgment.

Mr. Wasuna for the defendant opposed the application. He relied on the statement of defence and the replying affidavit filed on behalf of the defendant. He submitted that the defendant had raised several triable issues which should be ventilated in a full trial. He maintained that the basis of the plaintiff's claim was in respect of unpaid premiums which in his view was payable to the insurance company and not to an insurance broker. He submitted that if there was any claim in respect of unpaid premiums, the right party to sue for the same is the insurance company and not the insurance

broker.

Mr. Wasuna submitted that the plaintiff was not claiming that it had paid the insurance premiums on behalf of the defendant and therefore its claim for the payment of the said insurance premium could not be legally sustained. He submitted that the defendant had not admitted owing any sum to the plaintiff; and in the circumstances, the plaintiff's application was not for entry of judgment on the basis that the defendant had admitted the debt. He submitted that an issue had arisen whether some of the insurance policies issued had been cancelled. He insisted that this was an issue which should go to full trial. The other issue was whether the plaintiff was entitled to claim unpaid premiums on behalf of an insurance company which was no longer in Insurance general business. In his view, the defendant had raised several triable issues which would enable this court grant the defendant unconditional leave to defend the suit. He urged the court to dismiss the plaintiff's application with costs.

I have carefully considered the rival arguments made by the parties to this application. The issue for determination by this court is whether the plaintiff made a case to enable this court grant its application for summary judgment to be entered as prayed in the plaint. The principles to be considered by this court in determining whether or not to grant an application for summary judgment are well settled. In **Industrial and Commercial Development Corporation vs Daber Enterprises Limited [2001] 1EA 75**, the Court of Appeal held at page 76 as follows:

*“The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. And where the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable – see the cases of **Home and Overseas Insurance Co. Ltd v Mentor Insurance Co (UK) Ltd (in liquidation) [1990] 1 WLR 153, 158** and **Balli Trading v Afalona Shipping The Coral [1993] 1 Lloyd's Rep 1 CA**. A defendant who can show by affidavit that there is a bona fide triable issue is to be allowed to defend that issue without condition – see the case of **Jacobs v Booth's Distillery Co (1901) LT 262 hl.**”*

In the present application, it is the plaintiff's contention that it has established a case to enable this court grant it summary judgment as prayed in its plaint. The plaintiff's claim is in respect of unpaid premiums which the plaintiff alleged accrued on diverse dates in the year 2000 and 2001. The plaintiff is further claiming to be paid interest which had accrued in respect of the said unpaid premiums. The defendant disputes the plaintiff's claim. It was contended on behalf of the defendant that under the insurance brokerage agreement, the plaintiff was not required to pay any premiums on behalf of the defendant but rather was required to be paid commission by the underwriter on account of business that the plaintiff would place with the said underwriters on behalf of the defendant. Upon evaluation of the facts in support of the plaintiff's claim, it is clear that there is dispute as to the manner in which the said debt was incurred. The plaintiff did not avail to the court a breakdown of how the said unpaid premiums were incurred. It is unclear in respect of what specific insurance policies was the plaintiff claiming the unpaid premiums.

Further, the defendant raised an issue regarding the propriety of the plaintiff to file suit in respect of unpaid premiums on behalf of an insurance company. It was submitted by the defendant that the plaintiff had not placed before the court any evidence to suggest that it had paid the said premiums on behalf of the defendant or alternatively that it had the authority of the insurance company to file the present suit in respect of the said unpaid premiums on its behalf. I think the issue raised by the defendant is valid in the circumstances of this case and ought to be investigated further during the full hearing of this case. The plaintiff did not annex to the affidavit in support of its application for summary judgment any evidence that it had settled premiums on behalf of the defendant in respect of certain insurance policies. Further, from the correspondence annexed to the replying affidavit sworn by the legal officer of the defendant, it appears that there are certain insurance policies which were cancelled and which therefore could not attract payment of any premiums. That is an issue which can only be clarified during full trial.

It was conceded by the plaintiff that the company which had issued insurance policies on which the plaintiff is seeking to be paid unpaid premiums is no longer undertaking general insurance business. The question that comes to mind is to whose benefit will the said unpaid premiums accrue? That is an issue which can only be answered during the full trial of this case. In the premises therefore, I hold that the defendant has established that it has raised triable issues in its statement of defence to entitle this court to grant it unconditional leave to defend. The plaintiff's application for summary judgment has raised more questions than answers in regard whether or not the plaintiff is entitled to claim the said amount pleaded in its plaint. The plaintiff has failed to persuade this court that it is entitled to have its plea for summary judgment to be entered against the defendant. The application cannot succeed.

It is hereby dismissed with costs. The defendant is granted unconditional leave to defend the suit.

**DATED at NAIROBI this 21<sup>st</sup> day of May 2008.**

**L. KIMARU**

**JUDGE**