

REPUBLIC OF KENYA

HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT 173 OF 2002

HERITAGE INSURANCE CO. LIMITED.....PLAINTIFF

=VERSUS=

ALEX N. MIGORE.....DEFENDANT

RULING

During his testimony, P.W.2, the Branch Manager of the Plaintiff Company produced a letter or statement dated 1/03/2002 allegedly signed by the Defendant. It was the original copy.

The Counsel for the Defendant and interested parties objected to the reference or production of the letter by the Plaintiff. They stated that the Defendant cannot be called as witness for the Plaintiffs. The contents of the letter were contrary to his pecuniary interest. It is self incriminating. The Plaintiff's Counsel said that he accepts that it was a self incriminating statement. It confirms breach of policy and was made in the presence of a witness. That the statement is the entire foundation of the Plaintiff's case in Court.

I have considered the objections and the response. Section 33 (c) of the Evidence Act provides: - That

“ Statements, written, or oral of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable, are themselves admissible in the following cases :-

(a) -----

(b) -----

(c) When the statement is against the pecuniary or proprietary interest of the person making it, or when if true, it would expose him or would have exposed him to a Criminal Prosecution or to a suit for damages

(d) ----- ,

”

In the present case, the Plaintiff by Notice dated 7/04/04 gave Notice to Admit Documents on which on which the letter dated 1/3/2002 was listed. The Defendant issued a Notice of non-admission on 14/04/04 while the interested party gave such a notice on 16/04/04. The stated letter was purportedly signed by the Plaintiff in the presence of a witness. It was written in his capacity as the insured. I do find that the Plaintiff cannot compel the Defendant to be its witness to produce the letter which is adverse to the pecuniary interest of the Defendant. As a result, I think that the Plaintiff is entitled to refer and produce the said letter under the Provisions of Section 33 (c) of the Evidence Act and the relationship of the parties. An Insurance Policy is founded on utmost ***“uberrimae fideis”*** and if the letter was not obtained by fraud, or misrepresentation, then it is admissible. It is the Defendant to prove that he signed due to

fraud, misrepresentation, and coercion or otherwise.

I dismiss the objection and allow the Plaintiff to tender the statement and to call witnesses to prove it was made by the Defendant of his own free will.

DATED AND DELIVERED AT ELDORET ON THIS 10TH DAY OF DECEMBER 2007.

M.K. IBRAHIM,

JUDGE.