



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

Civil Case 590 of 2005

BESPOKE INSURANCE BROKERS LIMITED..... PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

RULING

This is an application by the plaintiff for summary judgment against the defendant. The application is expressed to be brought under Order XXXV Rules 1(1), (a), (2), (3) and 9, Order L Rules 1 and 3 of the Civil Procedure Rules and Section 3A of the Civil procedure Act (Cap 21 Laws of Kenya). The reasons for the application are that for the period between 1.7.2000 to 30.6.2003 the plaintiff at the defendant's request provided insurance brokerage services to the defendant and notwithstanding oral and written demands for payment of the sum claimed of KShs.27,914,768.10, the defendant has refused neglected and/or failed to pay the same or any part thereof. That the defendant is justly and truly indebted to the plaintiff and was so indebted at the commencement of this suit.

The application is supported by an affidavit sworn by one Geoffrey Wahome Muotia a director of the plaintiff. The application is opposed and there is a replying affidavit sworn by one Timothy Kamili the Treasurer of the defendant.

The plaintiff's claim is contained in the plaint filed on 14.10.2003. It is pleaded that the defendant awarded an underwriting contract to one of the insurance companies for which the plaintiff submitted a quotation to wit Invesco Insurance Company Ltd. Subsequently on 11.3.2003 the defendant wrote to the plaintiff confirming the appointment of the plaintiff as the insurance broker with effect from 1.7.2000. Pursuant to the said contract the plaintiff at the defendant's request prepared two reports of the plaintiff's insurance portfolio which reports were forwarded to the Ministry of Local Government. The plaintiff then invoiced the defendant for the commissions payable for the brokerage services amounting to the said sum of KShs.27,914,768.10 which the defendant has failed refused and/or neglected to pay.

The defendant delivered its defence on 11.11.2005. The defendant denies that a legal relationship was created between it and the plaintiff entitling the plaintiff to receive commissions from the defendant as claimed in the plaint. It is further pleaded that matters pleaded in the plaint were incapable of binding the defendant contractually as no consideration moved from the plaintiff to support the defendant's indebtedness to the plaintiff. There is also a plea that the plaintiff's suit is statute barred. In the premises, the plaintiff's claim of KSh.27,914,768.10 is denied and the plaintiff is put to strict proof thereof.

The plaintiff filed a Reply which joined issue with the defendant's entire defence. The plaintiff further denied that the action was time barred.

At the hearing of the application on 21.2.2006, I was taken through the affidavits, the annexures and the authorities.

I have considered the application, the pleadings, the affidavits on record the annexures to the affidavits and the submissions by the learned counsels. Having done so I take the following view of the matter. There are puzzles that have caused me concern in this application. On 11.2.2003, the defendant's parent Ministry directed the appointment of the plaintiff to provide insurance brokerage services to the defendant at what it termed "no extra costs to the Council". This letter was followed by the defendant's letter dated 11.3.2003 addressed to the plaintiff's Operations Director which letter also referred to the appointment as being at "no extra cost to the Council". The present Ministry seemed to subsequently change its position because on 11.7.2003, in a letter of even reference it advised the defendant to pay the plaintiff what it described as outstanding "three years agency fee". This letter appears to contradict the said Ministry's letter dated 22.5.2003 in which the Ministry approved the appointment of the plaintiff "subject to instructing the underwriter to pay the broker (Ms Bespoke)." This letter was in response to the defendant's letter dated 29.4.2003 vide which the defendant sought approval of the Ministry to obtain financing from a financier to pay the underwriter and not the plaintiff.

There is also the letter dated 26.5.2003 from M/s Arusei Letangule and Company Advocates written on the plaintiff's instructions to the defendant. This letter seems to suggest that the plaintiff was to be paid by the underwriter. This was apparently the position taken by the plaintiff in its letter dated 25.3.2003 to the Ministry. The Minister's Replying Affidavit in Nairobi HCCC No.1359 of 2003 a copy whereof is annexed to the application at hand seems generally to fortify that position. The material placed before me does not show that the plaintiff's case is an open and shut case. The defendant's allegation that it has settled outstanding premiums owed to the underwriters and therefore the plaintiff's claim, may not be altogether without foundation. In my view therefore the plaintiff's case is not a plain and obvious case. The defendant need only show one bonafide triable issue. I need not go beyond this otherwise I may prejudice the trial.

In the end I decline to grant the application dated 28.12.2005. It is dismissed with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2006.

F. AZANGALALA

JUDGE

21/3/2006

Read in the presence of:-

Maina for the applicant.

F. AZANGALALA

JUDGE

21/3/2006