

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI(NAIROBI LAW COURTS)

CIVIL CASE NO. 741 of 2003

COMPANY LIMITED PLAINTIFF

VERSUS

CONCORD INSURANCE CO. LTD.

INTER SECURITY SERVICES LTD.

SECURITY GROUP (KENYA) LTD.DEFENDANTS

R U L I N G

This Chamber Summons, dated 16/12/02 is brought under Order 39 rules 1, 2, 3 and 9 of the Civil Procedure Rules and Section 3A of Cap.21, Laws of Kenya. The application seeks:-

1. Interim injunction restraining First Defendant, its employees and all others from posting, advertising, circulating, uttering or in any manner falsely or maliciously citing Plaintiff's name as defaulter in premium payments whether with the Association of Kenya Insurers (AKI) or to any of its members or otherwise intimidating, harassing or threatening the Plaintiff with such action pending the hearing and determination of this suit, or application inter partes or until further orders herein.
2. Already spent. 3. Costs of this application by the 1st Defendant or in the Cause. 4. Such further or other orders as in the interests of justice may be deemed just and expedient. The application is supported by the Affidavit of Vimlesh Kumar Shukla of even date, and is on the grounds that: the 1st Defendant is an Insurance Company which has been sued by the Plaintiff for payment of its liability under Policy No.01/02/730179, dated 31/5/01 between it and the Plaintiff covering burglary on 209/10882, Libra Ware House, Mombasa Road, Nairobi, on the night of 28/29th April, 2002; that although the policy declared the sum insured as 5 million, there was an agreement between Plaintiff and Defendant that 1st Defendant would cover K.shs.10 million and Plaintiff paid premiums on that rate; that after the loss had taken place Defendant turned round and said only K.shs.5 million was the maximum; the said charge from K.shs.10 million to K.shs.5 million was unilateral and arbitrary;

1st Defendant declined to make part-payment on agreement and understanding to that effect; 1st Defendant declined to give Plaintiff on request copies of letters in its custody and relevant to Plaintiff's claim herein; some officers of 1st Defendant have threatened to intimidate and push the Plaintiff, in the hope that Plaintiff will abandon its claim to circulate Plaintiff's name among the AKI members with false allegations that Plaintiff is a defaulter in premium payments; 1st Defendant has refused to supply Plaintiff with Investigation Reports and Loss Adjusters Reports contrary to the normal practice in the insurance industry; unless the orders prayed for herein are granted, the 1st Defendant will proceed to circulate the said false reports to the damage and loss and detriment of the

Plaintiff; no prejudice would be suffered by the 1st Defendant by grant of the orders prayed herein; it is just and expeditiously in order to avoid mischief. In opposition, the 1st Defendant, through a Replying Affidavit by Edward N. Chege, dated 6/1/03 aver that: the application is based on falsehoods; that in breach of Clause 4 of the Agreement, Plaintiff refused to assist and co-operate with the investigators by failing to give the information and documents in support of its claim as a result the investigation reports could not be compiled; the Plaintiff owes the 1st Defendant K.shs.1,509,206/= in unpaid and outstanding premiums, and that is why the allegations are in bad faith.

I have carefully gone through the pleadings herein, and considered the submissions by the learned counsels for both parties to this application. From the above exercise there is sufficient evidence to support the 1st Defendant's averment that the Plaintiff/applicant refused and/or neglected to assist and or co-operate with the investigators and loss adjustors in making available the relevant information in the preparation and completion of the requisite Reports. This is evidenced by the annexures to the 1st Defendant's Replying Affidavit, particularly the letter, dated 28/10/02, by Safety Surveyors Ltd.

In the absence of such assistance and co-operation by the Plaintiff/applicant, it seems a mere legal force for the applicant to request and expect to get reports whose nonproduction is wholly its fault. This court cannot grant orders in vain. Accordingly, prayer No.2 in the application cannot be granted. Whether failure to assist and/or co-operate violates Clause 4 of the parties' agreement is not for me to pass on at this stage. That should be dealt with by the trial judge in the actual trial.

From the pleadings, and particularly the annexure to the Replying Affidavit, there is documentary evidence that the 1st Defendant has tabled outstanding premiums to the tune of just below K.shs.2 million as owing from the Plaintiff. This is in my view, is the gist of prayer No.1 of the present application.

Counsel for the 1st Defendant, Mr. Imanyara, submitted that the 1st Defendant has no intention of circulating or advertising the defaulting element in the plaintiff's premium payments. The Plaintiff's grounds of application, at paragraph K states that no prejudice would be suffered by the 1st Defendant as a result of granting prayer No.1 of the application.

Accordingly, the application herein partly succeeds and partly fails. This court grants the following orders:- 1. Prayer No.1 in the application pending the hearing and determination of the suit herein. 2. Prayer No.3, but with the costs being in the Cause.

DATED and delivered in Nairobi this 27th day of May 2005.

O.K. MUTUNGI

JUDGE