



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIR0BI**

**MILIMANI COMMERCIAL COURTS**

**Civil Case 542 of 2004**

**UNIVERSAL INSURANCE BROKERS.....PLAINTIFF**

**VERSUS**

**MALDE TRANSPORTERS LIMITED.....DEFENDANT**

**RULING**

This is an application to strike out the Defence, so that judgement may then be entered in favour of the Plaintiff, as prayed in the Plaint.

The application is expressed as having been filed pursuant to the provisions of Order 6 rule 13 (1) (b) (c) and (d); Order 35 rule 1 of the Civil Procedure Rules; as read together with Section 3A of the Civil Procedure Act.

Mr. Ojuro, advocate for the Plaintiff submitted that the Defence on record does not disclose any reasonable defence. It was his considered view that the defence was a sham, which did not raise any triable issue. To illustrate his point, counsel delved into the affidavit of Joseph N. Nzungu, the Chief Accountant of the Plaintiff.

By the said Affidavit, Mr. Nzungu, brought out the Plaintiff's case. He indicated that the Plaintiff used to underwrite various policies of insurance, at the request of the Defendant. The period in issue was said to have been 2003 the years and 2004.

It was the Plaintiff's case that the Defendant was obliged to pay premiums for the various policies of insurance, which the Plaintiff had underwritten. The total sum due from the Defendant to the Plaintiff, in relation to the said premiums is said to have been kshs. 4,309,122/75.

The Plaintiff said that it did issue an appropriate demand Notice to the Defendant on 23<sup>rd</sup> July 2004. A copy of the said Notice was attached to the affidavit of Mr. Nzungu, as an exhibit marked "JNN2."

In response to the Notice, by which the Plaintiff's advocates had demanded Kshs. 4,309,122/75, the Defendant wrote back on 2<sup>nd</sup> August 2004, explaining that its directors were away, but promising to communicate as soon as the directors were back in office.

In the light of that letter from the Defendant, the Plaintiff contends that the Defendant has not disputed the debt.

And, as if that is not enough to warrant the grant of judgement in favour of the Plaintiff, it is pointed out that the Defendant did issue four cheques, for the following sums;

- (a) Cheque No. 171519, dated 10.12.03,  
for Kshs. 1,000,000/=
- (b) Cheque No. 171520, dated 10.1.04,  
for Kshs. 1,100,000/=
- (c) Cheque No. 171521, dated 10.2.04,  
for Kshs. 1,100,122.75

When faced with the present application, the Defendant filed a Replying Affidavit, through a Mr. **WALTER OUMA OBUYA** who is described as an employee of the Defendant, whose duties include the custody of all accounts documents with the Plaintiff.

Mr. Obuya admits that the Defendant issued the four cheques for Kshs. 4,309,122/75. He also admits that the said four cheques were dishonoured.

Following the said admission, the Plaintiff submits that the rest of the Defendant's explanation, to the effect that the parties were reconciling their accounts could not lie. The Plaintiff submits that if the reason for the non-payment of the four cheques was some ongoing efforts to reconcile accounts, the Defendant would have stopped payment of the cheques. But, in this case, the cheques were dishonoured, therefore the Plaintiff believes that the Defendant's purported explanation ought to be rejected.

The reasoning put forward by the Plaintiff is logical, for it does not make much sense for the Defendant to issue cheques for the exact sum being claimed, and then let the cheques be dishonoured, if indeed the parties were having a go at reconciling their books.

And, at the same time, there is no assertion by the Defendant that the cheques were dishonoured for any reason other than because their bankers referred the cheques back to the drawers thereof.

In the absence of any explanation from the Defendant as to why it had issued cheques for the sum claimed by the Plaintiff, what possible defence, in substance, does the Defendant have?

In my considered view, if the Plaintiff's claim was founded solely on the cheques, the Defendant may have had little, if anything, to say in its Defence. But, as matters stand now, the claim is for premiums for various policies underwritten by the Plaintiff at the request of the Defendant.

In the alternative, the Plaintiff's claim is described as follows:-

**“the sum of Kshs. 4,309, 122/75 (is) payable by the Defendant to the Plaintiff in accordance with the law and/or custom and practice of the insurance business. In breach of the Defendants legal contractual obligation and/or breach of custom and practice of insurance business, the Defendant has failed to pay to the Plaintiff the said sum of money or any part thereof.”**

And, although the four cheques were dated between December 2003 and March 2004, they do not feature at all in the Plaintiff which was filed on 6<sup>th</sup> October 2004. I cannot help but ask myself, why?

I note that the Defence responds to each and every allegation in the Plaintiff. It accuses the Plaintiff of flouting the quotations it had given to the Defendant. The Defendant also denies being in breach of any law, custom or practice of the insurance business as alleged or at all. Indeed, the Defendant demands

particulars of the alleged custom and practice.

Then the Defendant provides particulars of errors and overcharge made by the Plaintiff. In the process of setting out the particulars, the Defendant points out that the Plaintiff's Statement of Account, for the Defendant, shows that the Defendant owed Kshs. 3,974,100/10, as at 30<sup>th</sup> September 2004.

In response to that aspect of the particulars, the Plaintiff's counsel contends that the same constitutes an admission that the Defendant owes Kshs. 3,974,100/10, to the Plaintiff.

However, I do not think that the said statement can, by any stretch of imagination, be deemed to constitute an admission by the Defendant. The figure is cited at sub-paragraph (f), which reads as follows:-

**“The Plaintiff's Statement of Accounts dated 30<sup>th</sup> September 2004 gives the figure of Kshs. 3,974,100.10 which is still the results of overcharges and failure to credit the overcharges.”**

Clearly, the Defendant is saying that that figure is extracted from the Plaintiff's records, but that it is still erroneous, as the Plaintiff had overcharged, and failed to give credit where there had been overcharges.

Thereafter, at paragraph 6 of its Defence, the Defendant denied being indebted to the Plaintiff as alleged or at all. Indeed, the Defendant asserted that it had paid all premiums as agreed.

And, in the Replying Affidavit, the Defendant has given particulars of credit notes issued by the Plaintiff subsequent to the dishonour of the four cheques. One such credit note is Number 4938, dated 31<sup>st</sup> August 2004, for Kshs. 2,473,404. There is also credit note Number 4920 dated 30<sup>th</sup> July 2004, for Kshs. 240,000/=. If those two figures are added together, the total is Kshs. 2,713,404/=. Considering that the credit notes were issued after suit had been filed, the question that arises is whether or not the Plaintiff's claim should be reduced by that sum. If that were to be done, the said claim would have been reduced to Kshs. 1,595,718/75.

However, I do not think that matters between these two parties are that straightforward. I say so because whereas the Plaintiff was giving some credit notes subsequent to filing the suit, the Plaintiff was also raising further invoices for other premiums. In other words, the parties continued to carry on business, even after the suit had been filed. The continued business dealings would explain why in the Statement of Account dated 30<sup>th</sup> September 2004, the Plaintiff indicated that out of the total outstanding sum of Kshs. 3,974,130/10; a sum of Kshs. 130,216/= was in relation to the period not earlier than 30<sup>th</sup> July 2004.

All the foregoing figures appear to support the Defendant's contentions that:-

- (a) The Plaintiff had earlier overcharged, hence the credit notes; and,
- (b) the parties were actively reconciling their accounts.

To my mind, this case is distinguishable from **CORPORATE INSURANCE LTD V. SAVEMAX INSURANCE BROKERS LTD & ANOTHER, HCCC No. 125 of 2002 (MILIMANI)**. In that case, the Plaintiff applied for judgement on admission. In his considered Ruling, Mwera J. noted as follows:-

**“That the Defendants even had issued four (4) cheques for this sum, which cheques were returned unpaid and then this was followed by meetings to pay, that came to nothing.”**

Whereas in that case the dishonoured cheques were followed with meetings to pay, in this case there

followed substantial credit notes issued by the Plaintiff. Also, whilst in that case the court held that it was:-

**“satisfied that the Defendant insurance broker admitted owing the Plaintiff money collected but not paid over in premiums between July 1998 and August 2001”;**

In this case, the Plaintiff itself has annexed a letter from the Defendant in which the Defendant said that it would respond to the Plaintiff’s demand once its directors were back in office. That statement cannot be deemed to be an admission of the sum claimed by the Plaintiff.

As I understand it, the Plaintiff is urging the court to presume that by issuing the four cheques, the Defendant should be deemed to have admitted owing the money. Much as that presumption may appear to be an attractive idea, this court believes that it also needs to be asked why the Plaintiff thereafter issued credit notes for substantial sums, if indeed the Defendant owed it the amounts claimed.

In the final analysis, I find that the Defence herein is not a sham. It raises pertinent issues which can only be resolved by the court after receiving viva voce evidence, which would be tested through cross-examination, so as to enable the court get to the bottom of the case.

Accordingly, the Notice of Motion dated 20<sup>th</sup> April 2005 is dismissed with costs.

Dated and Delivered at Nairobi this 26th day of September 2005.

FRED A. OCHIENG

JUDGE