



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 302 OF 2001

UNIVERSITY OF NAIROBI.....PLAINTIFF

VERSUS

BESPOKE INSURANCE BROKERS LTDRESPONDENT

RULING

The plaintiff prayed for judgement on admission under o 12 r 6 of the Civil Procedure Rules (CPR) and/or summary judgment under o 35 1(1)(a), 2, 3 CPR and also invoked s 3A CPA. The sum in issue was sh. 7,446,080/ 50 made up in three or so lots as shall appear below. This application which Miss Mululu argued was supported by the affidavit of one Michael Karue supplemented by another sworn on 29.9.2001. The plaintiff counsel swore another supplementary affidavit on 16.10.2001. Each of them had exhibits annexed and the depositions plus annexures shall be referred to as and when it is necessary to do so.

Mr. Ongegu opposed the application basing that position on the replying affidavit of one Kagwe Githui sworn on 9.10.2001. This court will also refer from time to time as the need arises to the amended plaint filed here on 20.7.2001. Miss Mululu did stress while Mr Ongegu denied that the defendant had admitted the various sums of money that made up the claim. Of particular and central focus were the defendant's letters of 3rd March, 14th April, 22nd August and 14th October all of 2000.

Put briefly the defendant was the plaintiff's insurance broker. It placed insurance business and particularly for motor and other covers with various insurance companies. The period in issue according to the plaintiff was 1999 and 2000. The defendant spoke of the time as being 2000 and 2001 but this court did not find that this was a matter of essence at this point.

The sums claimed appear in paragraphs 4, 5, 6, 6A of the amended plaint.

These are:

- (i) Excess premium paid sh 1,800,329/= (para 4)
- (ii) Claim received in respect of Motor vehicle registration No KAH 409G - sh 2,000,000/= (para 5)
- (iii) Sum paid to the defendant but not remitted to M/s Mercantile Insurance Co Ltd (para 6) sh 3,465,969/50 (para 6)
- (iv) Repairs of motor vehicle registration No KZX 872 shs 189,700/= (para 6A)

Beginning with the first part of the claim.

(i) Excess Premium Paid sh 1,800,392/=. The plaintiff pleaded that it paid this sum and the defendant acknowledged the overpayment in letters dated 3.3.2000, 14.4.2000 and 17.10.2000. That the plaintiff asked for and defendant agreed to make a refund but that it neglected failed or refused to do just that.

In the amended defence (para 4) the defendant averred that that sum of sh 1,800,329/= was:

“..utilised in payment of insurance premiums to various underwriters for the benefit of the plaintiff and the defendant served a credit note to the plaintiff on 22.5.2000.”

The defendant also wished to rely on the letters of 13.3.2000 (sic), 14.4.2000 and 17.10.2000.

We now turn to those letters. The defendant’s letter dated 3.3.2000 to the plaintiff read in pertinent parts as follows. It was headed accounts reconciliation.

“After a thorough scrutiny of our records, the underwriter’s records and your records we have realised that our account is in credit balance of Ksh. 1,800,329/ = ..we have almost completed the accounts with the underwriters and are making arrangements to clear any unsettled balances.”

In the letter of 14.4.2000 the defendant wrote to the plaintiff about this sum (and another which we will revert to later) saying:

“(B) Account Overpayment – Ksh 1,800,329/= We refer to the above and confirm that both payments will be effected on (14th and) 28th May 2000 (respectively). (underlining added)

Miss Mululu maintained that the plaintiff asked for a cash refund of this sum. The defendant on 14.4.2000 promised payment by 28.5.2000. However on 17.10.2000, the defendant told the plaintiff in a letter:

“(c) Account Payment
You have raised the issue of overpayment of Kshs 1,800,329/= in the previous period of insurance. Please note that we issued out credit note No 0002 for this amount on 22nd May 2000. We trust that you will put this credit into consideration.”

Karue said in his affidavit (para 5) that the plaintiff requested for a refund of this sum and did not authorise the defendant to apply it for any other purpose. That their records had nothing to show that the said sum was utilised to pay premiums for the benefit of the plaintiff.

The defendant’s reply to this (see Githu’s replying affidavit para 5) was that the sum of sh 1,800,329/= had been used to pay premiums to various underwriters for the benefit of the plaintiff. This court is satisfied that the sum was acknowledged by the defendant as an overpayment which it would refund. It did not do so and it was not shown that it used that sum to pay underwriters for the benefit of the plaintiff or at all. The plaintiff is entitled to it and there is no defence to it.

(ii) The claim sum received in respect of motor vehicle No KAH 409G – sh 2m.

The plaintiff averred that the defendant did receive this sum on account of the claim in respect of the motor vehicle aforesaid. That in its letters of 14.4.2000 and 17.10.2000 it confirmed the same and sought time within which the sum was to be paid over. It did nothing of the sort. The defence as amended at para 5 denied being paid this sum. That indeed the plaintiff’s insurers offered to pay it sh 1.2m which the former rejected and the matter still awaits resolution.

The plaintiff repeated what it pleaded in its affidavit in support of the application. On its part the defendant denied ever being paid sh 2m herein adding that no evidence of such payment had been laid. That M/s Gateway Insurance Co Ltd did not pay that sum and that the plaintiff signed no discharge voucher in that regard.

On 14.4.2000 the defendant told the plaintiff that it was confirming that payment of sh 2m – a claim for

KAH 409G would be paid on 14.5.2000. Then on 22.8.2000 the defendant told the plaintiff:

“Further we have agreed to settle the outstanding claim of Ksh 2,000,000/= in respect of the stolen Vice Chancellor’s vehicle registration No. KAH 409G by the last week of September 2000.”

Apparently this was not forthcoming. The defendant did not even allude to the allegation that it could not pay this sum because M/s Gateway Insurance Co Ltd did not tender it. Or that only a fraction was tendered and the plaintiff had declined to accept it. However on 17.10.2000 the defendant prayed the plaintiff:

“(d) Outstanding Claim for KAH 409G. It is indeed true that we had promised to settle the said claim at an amount of Ksh 2,000,000/= by the end of September. We have not altered this intention and we can only request for your indulgence as we shall remit this amount by November 2000.”

The defendant could not be promising to pay what it did not receive. It did not pay by November 2000 and on 2.3.2001 this suit was brought. Having considered all the foregoing there cannot be said to be any triable issue here and the plaintiff is entitled at this stage to get what the defendant admitted that it owed but did not remit.

(iii) Sh 3465,969/50: The plaintiff pleaded that it paid this sum to the defendant for onward transmission to Ms Mercantile Insurance Co. Ltd. but the defendant did nothing of the sort. The Court heard that the insurance covers were cancelled and the plaintiff had to pay directly a similar sum for their reinstatement. That on 17.10.2000 the defendant acknowledged receiving the claimed sum but on failing to transmit it, also failed or refused to refund it. T

he defence of 22.10.2001 denied such a state of affairs. But it added that if indeed the plaintiff paid that sum to the defendant it was used to pay premiums on behalf of the plaintiff together with penalties provided for under s 156 of the Insurance Act (Cap 487).

In the supporting affidavit what has been stated above was repeated by Karue.

On its part the defendant deponed that it used sh 3,465,969/50 to pay the plaintiff’s underwriters M/s Mercantile Life and General Assurance Co Ltd. A statement of Account (KG1) was appended. However asked in court to pinpoint the entries of such sum in that statement Mr Ongegu was of the view that only his client would do so. Still the plaintiff claimed and the defendant did not deny that the former paid it sh 3,465,969/50. All it claimed is that it applied that sum to pay premiums with M/s Mercantile Life & General Insurance Co Ltd. But that company did not agree with the defendant because on 6.7.2001 it gave a break-down of how it received payment from the plaintiff: _

On 12.10.2000 - sh 2,369,873/=

On 9.11.2000 - sh 2,779,187/=

Sh 5,149,060/=

And that insurer added:

“1, At the time of suspension of covers the outstanding premium was sh 7,163,726/=

2, No remittances were made by Bespoke to us” (underlining supplied)

One would ask then where and when did the defendant pay the claimed sum to the underwriters? The impression left that it received that sum but did not remit it to this insurer. The insurer received the sum quoted above to have the plaintiff’s covers reinstated and the defendant acknowledged so on 17.10.2000. It has no defence to this claim and it is meet and fair that the plaintiff gets the sum now without further

ado.

(iv) Regarding m/v KZX 872 – sh 189,000/=

The plaintiff has it that this motor vehicle was involved in an accident. It was taken to M/s Marshalls (EA) Ltd for repairs. Insurers paid the defendant sh 189,700/= but when it gave its cheque to Marshalls it was returned unpaid (“RD”). That the plaintiff then paid the garage and got its motor vehicle released. That the defendant never made good this cheque.

The defendant denied that it received the sum claimed from the plaintiff’s insurer and also that it did draw cheque no 000795 in favour of the plaintiff. It should actually be in favour of Marshalls for that is what it is. That if such a cheque was drawn it was without consideration.

Karue repeated in his affidavit the averments in the plaint but then annexed the cheque (MK2) it was dated 3.8.2000 and drawn by the defendant for the sum in issue and payable to M/s Marshalls EA Ltd. On 1.9.2000 it was returned with remarks “Refer to Drawer”, - the polite way the bankers tell a payee that the drawer has no money to meet the cheque.

The defendant deponed that it had reached an agreement with the plaintiff that this cheque would be drawn post-dated as all awaited for M/s Gateway Insurance to deposit the sum of sh 189,700/= in the defendant’s account. That anyway, if the cheque bounced the plaintiff should have sued the garage and that in any case the plaintiff had not shown by evidence that it paid the sum to Marshalls. The plaintiff even signed a discharge voucher on 3.3.2000.

Having considered all said about this sum the Court is left with the view that the defendant has no defence to claim for this sum at all. It may as well be ended by awarding it here.

In sum, the plaintiff’s prayers are granted under o 12 r 6 CPR for the greatest part of the claim and o 35 CPR for the last bit.

The Court has gone into all the foregoing to ensure that had the defendant been entitled to have his day during a full trial, it should have been given. It did not deserve that. Costs to the plaintiff.

Orders accordingly. But should the defendant feel that the matter ought to be determined after trial then it should deposit the claimed sum shs 7,446,980/50 in both lawyers names to earn income until final disposal.

This it should do in the next 30 days.

Dated and delivered at Nairobi this 12th day of February, 2002

J.W MWERA

JUDGE