REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 2030 OF 2000

ALPHA KNITS LIMITED …………………………………. PLAINTIFF

VERSUS

KENINDIA ASSURANCE COMPANY LIMITED …… DEFENDANT

RULING

The plaintiff was the defendant's insured under various policies covering loss or damage by fire at its factory on Plot No. 227 Ruiru. On 5.4.1997 at about 4.45 p.m. during the currency of the policies, the factory was destroyed by fire and the plaintiff lodged a claim under the policies.

Following an assessment of the loss sustained by the plaintiff, the defendant agreed to pay the sum of Shs.162,855,227/= in satisfaction of the plaintiff claim.

The plaintiff contends that out of the sum of Shs.162,855,227/= which the defendant agreed to pay, only Shs.155,625,577/= was paid, leaving a balance of Shs.7,229,650/= still unpaid. The plaintiff's claim against the defendant in this suit is for that unpaid balance amounting to Shs.7,229,650/=.

In its defence the defendant accepts that the amount payable to the plaintiff under the policies arising out of the fire that burned down the plaintiff's factory was Shs.162,855,227/= but avers that the sum has been paid as follows:-

(a) Shs.155,625,577/= to Kenya Commercial Bank.

(b) Shs.7,229,650/= through a credit note passed (by the defendant) on 31.10.1997 to the account of the plaintiff's insurance brokers, Bid Insurance Brokers Ltd.

The defendant attempts to justify the payment to Bid Insurance Brokers Ltd. by stating, in its defence, that:-

(a) the payment was in accordance with the course of business which had existed between the parties since at least 1993 and which has continued until 2000;

(b) the plaintiff held out Bid Insurance Brokers Ltd. as the agent of the plaintiff authorised to receive payment from the defendant;

(c) the discharge voucher for Shs.7,229,650/= was delivered to the defendant by Bid Insurance Brokers Ltd; and

(d) in the circumstances, Bid Insurance Brokers had actual or implied authority to receive payment on behalf of the plaintiff and the plaintiff is estopped from denying such authority or

the payment of the moneys claimed.

By a notice of motion application dated 2.5.2001 made under O. VI Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules, the plaintiff has moved this court for orders to strike out the defendant's defence and for judgment to be entered in its favour against the defendant for the said sum of Shs.7,229,650/= together with interest and costs as prayed in the plaint. By virtue of Rule 16 of O. VI of the Civil Procedure Rules, an application of this sort ought to be brought by summons but since the point was not taken at the hearing of this application, I do not think I ought to say much about it. The application is based on the following grounds:-

"1. THAT the Defendant's defenc e filed is scandalous, frivolous and vexatious.

2. THAT the defence filed may prejudice, embarrass or delay the fair trial of the action.

3. THAT the defence filed is otherwise an abuse of the process of the court.

4. THAT the Defendant is truly and justly indebted to the Plaintiff in the sum claimed in the plaint.

5. THAT the Defendant's defence is a sham.

6. THAT the grant of this application will operate to meet the ends of justice.

and is supported by an affidavit sworn on 25.4.2001 by Dipak Gulabchand Bid, a director of the plaintiff company.

The defendant's Senior Manager, Legal Department, Mr. Shem Kimani Macharia has sworn and filed a replying affidavit in which the facts on which the defendant relies on for its opposition to the application have been set out.

Apart from repeating what is contained in the plaint, Mr. Bid's affidavit states that the plaintiff did not owe the defendant any monies either directly or indirectly or through the said Insurance Brokers known as Bid. It is further deponed in the same affidavit that the account the Insurance brokers run with the defendant has nothing to do with the plaintiff and consequently there was absolutely no justification for the defendant to credit the said sum in Bids account.

As to the alleged business practice which allegedly justified the defendant's action, Mr. Bid depones that if any payment had to be made to Bid Insurance Brokers, as happened on 9.9.1997, the plaintiff had to authorise the defendant in writing in that regard. Such authority, he further states, was not sought or obtained with regard to the payment of Shs.7,229,650/=. His contention is therefore that the payment was made without the plaintiff's authority and knowledge.

Having carefully gone through the affidavit sworn by Mr. Shem Kimani Macharia, I must right at the outset observe that most of what he says is irrelevant to the issues at hand. In my view, the contents of the affidavit do not answer the claim made by the plaintiff against the defendant. For example, in paragraph 2 and 5 of his affidavit, Mr. Macharia talks about "all dealings by the plaintiff with the defendant in connection with the various insurance policies which the plaintiff took out with the defendant 'having been done through the plaintiff's brokers, Bid Insurance Brokers Limited" which matter is clearly not really the problem in this case. It is more than obvious that the plaintiff would not have complained at all if all there is in this case is payment through Bid Insurance Brokers Limited because in such an event the money would have ultimately reached it. What really irks the plaintiff is the fact that payment was made to the Brokers and not to it. Accordingly, by talking about payments being made through the insurance brokers and ignoring the issue of payment to the plaintiff, the defendant is clearly attempting to throw a red herring and also to skirt the issue.

As to the alleged custom in the insurance industry in respect of payments from the insurers to the

insured being channelled through the insured's brokers and the claim that it had also been the course of business between the plaintiff, the defendant and Bid Insurance Brokers Limited for payments in respect of claims made by the plaintiff to be paid by way of a credit note from the defendant to Bid Insurance Brokers Limited, my observations are that there is no evidence to show that any such payments were made without the authority of the insured.

While therefore I can see nothing wrong in channelling payments to claimants through brokers, it would be patently improper and illegal for an insurance company to pay to an Insurance Broker moneys due to an insured without first obtaining the authority of the insured in that behalf. In that respect it may be worth reminding ourselves of the provisions of Section 105 of the Insurance Act. The section enacts:-

> ***"Where a claim arising under a policy is paid, no deductions shall, except with the consent in writing of the claimant, be made on account of premiums or debts due to the insurer under any other pol icy."***

In my view the documents annexed to Mr. Macharia's affidavit do not justify payment by the defendant of claims due to the plaintiff to Bid Insurance Brokers Limited. It was therefore wrong for the defendant to credit into the accounts of Bid Insurance Brokers Limited, moneys due to the plaintiff.

As stated above, this application is brought under O. VI Rule 13(1) (b) (c) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. Under those rules, the court has the power to strike out pleadings on the ground that it is scandalous, frivolous or vexatious; or it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the court. In my view a sham defence which is based on non-existent premises is not only scandalous and frivolous but also vexatious and clearly calculated to embarrass or delay the fair trial of the case. (see Johnson Joshua Kinyanjui & Another v. Rachel Wahito Thande & Another (Court of Appeal, Civil Appeal No. 284 of 1997).

I am aware that the remedy of striking out pleadings is a draconian one which should be exercised only in plain and obvious cases. As observed by Madan J.A. (as he then was) in the case of D. T. Dobie & Co. (K) Ltd. v. Muchina & Another – Court of Appeal Civil Appeal No. 37 of 1978:-

> ***"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment; The court ought to act very cautiously and carefully consider all facts of the case without embarking upon a trial thereof, before dismissing a case for disclosing no reasonable cause of action or being otherwise an abuse of the process of court."***

When however it is clear and obvious as it is in this case that the matters being raised in the defence are immaterial and irrelevant (see Lynete B. Oyier; Geoffrey Oyier & Michael Oyier v. Savings & Loan Kenya Limited (H.C.C.C. No. 891 of 1996) or that on the facts of the matter the defendant is not entitled to claim that it was justified in paying to a third party moneys plainly and obviously due to the plaintiff and therefore by doing so the defendant is putting forward an unsustainable defence, then the court is entitled to exercise those powers and strike out the pleading because besides other things, such a pleading is an abuse of the process of the court

. For all the above reasons, the application is allowed, the defence struck out and judgment entered in favour of the plaintiff against the defendant as prayed. The defendant will bear the plaintiff's costs of this application.

Dated at Nairobi this 27th day of July, 2001.

T. MBALUTO

JUDGE