



ICK Insurance Brokers Limited v Kenindia Assurance Company Limited (Commercial Case E121 of 2023) [2024] KEHC 15970 (KLR) (Commercial and Tax) (17 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15970 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E121 OF 2023
MN MWANGI, J
DECEMBER 17, 2024**

BETWEEN

ICK INSURANCE BROKERS LIMITED PLAINTIFF

AND

KENINDIA ASSURANCE COMPANY LIMITED DEFENDANT

RULING

1. The defendant/applicant filed a Notice of Motion application dated 10th August 2023 pursuant to the provisions of Section 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 2 Rule 15(1) & Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law seeking an order that the plaintiff's/respondent's suit be struck out with costs to the defendant.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Ms Winnie Awuor, the defendant's Head of Legal. The defendant's case is that the plaintiff filed a suit against it vide a plaint dated 21st March 2023, alleging breach of an Agency Contract involving the identification of potential insurance customers by the plaintiff for the defendant, in exchange for brokerage commissions. Ms Awuor averred that the plaintiff's claim primarily concerns the defendant's non-payment of "override commissions," which are commissions exceeding those prescribed under the *Insurance Act* contrary to the provisions of Sections 73(2) & (3) of the *Insurance Act*. She contended that override commissions are illegal and contrary to the *Insurance Act*, which prescribes specific limits on brokerage commissions.
3. The defendant contended that disputes in the insurance industry are governed by the Insurance Regulatory Authority (IRA) and the Insurance Appeals Tribunal (Tribunal). Ms. Awuor referred to Section 173(3) of the *Insurance Act* as read with the Insurance (Insurance Appeals Tribunal) Rules, 2013 and stated that they assign first-instance jurisdiction on insurance disputes to the said bodies,



reserving the Court's role for appeals. She further stated that the above notwithstanding, since the plaintiff's claim is based on an alleged breach of contract, it ought to have been filed within six years from the accrual of the cause of action, as provided for under Section 4 of the [Limitation of Actions Act](#).

4. In opposition to the application, the plaintiff filed a replying affidavit sworn on 25th August 2023 by Mr. Rahul Sahi, the plaintiff's Director. He averred that the defendant breached its contract with the plaintiff by failing to pay brokerage and override commissions as agreed. He contended that override commissions are recognized in insurance contracts, particularly in life insurance contracts, as provided for under Section 73(4) of the [Insurance Act](#) and Rule 6(15)(d) of the Insurance (Valuation of Technical Provisions for Life Insurance Businesses) Guidelines, 2017.
5. Mr. Sahi stated that while the insurance industry has internal dispute resolution mechanisms, these do not oust this Court's jurisdiction, as the Insurance Appeals Tribunal has limited pecuniary jurisdiction, which is far exceeded by the plaintiff's claim of Kshs.245,413,031.26. The plaintiff cited the provisions of Section 173 of the [Insurance Act](#) and asserted that it applies to appeals against decisions of the Commissioner of Insurance, not contractual disputes. He averred that the defendant has made part payments for the commissions effectively acknowledging the debt, and as such, the defendant's claim that the plaintiff's suit is time-barred cannot stand.
6. The instant application was canvassed by way of written submissions which were highlighted on 23rd July 2024. The defendant's submissions were filed on 3rd May 2024 by the law firm of Oraro & Company Advocates, whereas the plaintiff's submissions were filed by the law firm of Sow Advocates LLP on 21st July 2024.
7. Mr. Ajak Jok Ajak, learned Counsel for the defendant referred to the provisions of Section 204A(1) of the [Insurance Act](#) and submitted that the plaintiff failed to exhaust statutory remedies provided for under the [Insurance Act](#) before filing this suit, as required by the doctrine of exhaustion. He contended that the plaintiff has not shown any exceptional circumstances or constitutional concerns to justify bypassing these remedies, making this suit premature. To buttress these submissions, Counsel relied on the Supreme Court case of United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others [2021] eKLR.
8. Counsel argued that the override commission claimed by the plaintiff is illegal pursuant to the provisions of Section 73(2) of the [Insurance Act](#). He cited the cases of Heptulla v Noormohamed [1984] eKLR and Five Forty Aviation Limited v Erwan Lane [2019] eKLR, and asserted that this Court cannot enforce such an illegality. Mr. Ajak Jok Ajak relied on the case of Bosire Ogero v Royal Media Services [2015] eKLR, and stated that under the provisions of Section 4(2) of the [Limitation of Actions Act](#), claims for breach of contract must be brought within six (6) years, and since this suit was filed in the year 2023, any claim pre-dating 2017 is time-barred.
9. Mr. Wafula, learned Counsel for the plaintiff relied on the case of Abdikadir Suleiman v County Government of Isiolo & another [2015] eKLR, and submitted that Sections 173 & 204 of the [Insurance Act](#) do not apply to disputes arising from contractual obligations, such as the one between the parties in this case, nor do they oust the Court's jurisdiction. He asserted that there are exceptional circumstances to justify bypassing the remedies provided for under the [Insurance Act](#). Counsel cited the Court of Appeal case of Diana Katumbi Kiio v Reuben Musyoki Muli [2018] eKLR, and argued that under Section 4(1) of the [Limitation of Actions Act](#), the limitation period begins when the cause of action arises, not when the contract was executed.
10. Mr. Wafula disputed the defendant's claim that this suit is time-barred, asserting that the referenced paragraphs in the plaintiff's plaint do not specify when the breach occurred. Instead, they describe ongoing discussions about override commissions. He maintained that the breach was continuous and



extended up to 2022, placing the suit within the limitation period. Counsel cited Section 73(4) & Rule 6(15)(d) of the Insurance Guidelines, 2017 and stated that override commissions, particularly in health insurance, are not inherently illegal under the *Insurance Act*. He further stated that the defendant, which was offering health and life insurance policies, entered into agreements that provided for override commissions, and made partial payments but failed to complete payment. Mr. Wafula referred to the case of *Victoria Insurance Brokers Limited v Jubilee Insurance Company of Kenya Limited* [2020] eKLR, and asserted that the plaintiff's suit is not based on an illegality.

ANALYSIS AND DETERMINATION.

11. I have considered the instant application, the affidavit filed in support thereof, the replying affidavit by the plaintiff and the written submissions by Counsel for the parties, the issues that arise for determination are –
- i. Whether the doctrine of exhaustion is applicable to this case;
 - ii. Whether the plaintiff's suit is time barred; and
 - iii. Whether the plaintiff's claim is based on an illegality.

Whether the doctrine of exhaustion is applicable to this case.

12. The doctrine of exhaustion is defined in the Black's Law Dictionary 10th Edition as follows -
- Exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.
13. The Court of Appeal in the case of *Republic v National Environment Management Authority Ex parte Sound Equipment Ltd* [2011] eKLR, while speaking to the doctrine of exhaustion made the following observation -
- ...Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ...
14. The defendant cited the provisions of Sections 204A & 173 of the *Insurance Act* and submitted that the plaintiff's suit offends the doctrine of exhaustion, thus it should be struck out. The said Sections provide as hereunder -
- Section 204A
1. Any insurance customer may lodge a written complaint with the Commissioner against a regulated entity in relation to the provision of its services.
 2. Subject to subsection (3), where the Commissioner determines a dispute such determination shall be binding on the parties to the dispute.



3. A party that is dissatisfied with the determination of the dispute by the Commissioner may within thirty days appeal the determination to the Tribunal.

Section 173

1. A person aggrieved by a decision of the Commissioner under this Act may, within one month from the date on which the decision is intimated to him, appeal to the Tribunal which may, subject to such terms and conditions as it may consider necessary, uphold, reverse, revoke or vary that decision.
 2. Except as provided in this section the decision of the Tribunal on an appeal made to it under subsection (1) shall be final and conclusive.
 3. A person aggrieved by a decision of the Tribunal made under subsection (1) may, if it involves a question of law, within one month from the date on which the decision is intimated to him, appeal therefrom to the court.
 4. A reference in this section to a question of law does not include a reference to a question whether there is sufficient evidence to justify a finding.
 5. The Chief Justice may make rules for regulating the practice and procedure in connection with an appeal under subsection (3) and for the better carrying into effect the provisions of that subsection.
15. On perusal of the plaintiff's plaint dated 21st March 2023, it is apparent that the dispute between the parties herein centers on an alleged breach of contract, where the defendant reportedly failed to pay the plaintiff's earned commission and overriding commission. It is not in contest that the relationship between the parties herein is not one of a service provider-customer, but one of a principal- agent wherein the plaintiff would introduce clients to the defendant who would later be insured by the defendant, and the plaintiff would earn a percentage commission on the premiums.
16. In the said circumstances, the provisions of Section 204A do not apply to relationships between Insurance Companies and Insurance Brokers since subsection (1) provides an avenue for an insurance customer to complain to the Commissioner of Insurance against an Insurance Company in respect to the provision of its services, whereas Section 173 provides an avenue for appeals against decisions of the said Commissioner. It is my finding that the doctrine of exhaustion is not applicable to this case.

Whether the plaintiff's suit is time barred.

17. The defendant contended that the plaintiff's suit is time-barred having been filed after the lapse of six years since the cause of action arose, contrary to the provisions of Section 4(1) of the [Limitation of Actions Act](#) which states as follows -

The following actions may not be brought after the end of six years from the date on which the cause of action accrued -

- a. actions founded on contract;
- b. actions to enforce a recognizance;
- c. actions to enforce an award;
- d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;



- e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
18. It is evident from the above provisions that no one has a right to bring a suit based on contract after the lapse of six years. The Court of Appeal in the case of *Divecon v Samani* [1995-1998] EA 48, in addressing the question of *Limitation of Actions Act* held as follows -
-to us, the meaning of the wording of section 4 (1) is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that....the wording of section 4 (1) of the *Limitation of Actions Act* (Chapter 22) suggests a discretion that can be invoked?
19. In determining whether or not the plaintiff's suit is time barred, this Court has to first determine when the cause of action between the parties herein arose. On perusal of the plaintiff's pleadings, this Court notes that the plaintiff claims to have been introducing various customers to the defendant, who the defendant would later insure, and thereafter the plaintiff would earn a percentage commission on the premiums paid by the said customers. The plaintiff claims that between the period 2012 to 2014 with the exclusion of November & December 2014, the plaintiff had earned commissions of Kshs.18,148,976.00, but the defendant only paid Kshs.11,897,005.00, thus leaving a balance of Kshs.6,251,971.00, which is due and still owing to date. The plaintiff further claims that the overriding commission owed to it by the defendant between the years 2015 & 2020, is Kshs.124,023,807.75.
20. On perusal of the bundle of documents filed by the plaintiff in support of its case, particularly the email correspondence between the parties herein, this Court notes that the parties have been engaging on the issue of unpaid commission on premiums for the period 2012-2022, owed to the plaintiff by the defendant since sometime in February 2017 through e-mail, tele-conversations and even physical meetings. From the said correspondence, it is evident that the plaintiff's contention is that some payments were made by the defendant, but some still remained outstanding leading the plaintiff to issue the defendant with a demand letter dated 9th November 2022 claiming unpaid commission on premiums for the period 2012-2016, despite several promises for payment of the same being made over the years.
21. It is my finding that since the alleged default was a continuing one, for amounts due over the years as stated by the plaintiff, the cause of action arose in the year 2022, when the demand letter was issued to the defendant due to the alleged non-payment of outstanding commissions. As a result, the plaintiff's suit is not time barred having been filed within the six year period provided for under Section 4(1)(a) of the *Limitation of Actions Act*.

Whether the plaintiff's claim is based on an illegality.

22. The defendant referred to the provisions of Section 73(2) of the *Insurance Act* and submitted that it prohibits commissions exceeding limits prescribed under the *Insurance Act*, and as such, the overriding commission claimed by the plaintiff is illegal and cannot be enforced by this Court. The plaintiff on the other hand submitted that an overriding commission is an insurance commission paid to an agent



or intermediary for exceeding set targets. Further, that it is a common and legally recognized feature of insurance contracts between insurers and intermediaries, contrary to the defendant's claims. The plaintiff further referred to the provisions of Section 73(4) of the *Insurance Act* and Rule 6(15)(d) of the Insurance (Valuation of Technical Provisions for life Insurance Businesses) Guidelines, 2017, and asserted that the defendant provides health and life insurance policies, which were part of Agreements with the plaintiff. Further, while the defendant initially paid substantial override commissions to the plaintiff, it has since refused to complete the remaining payments.

23. On perusal of the averments and submissions by Counsel for the respective parties on the issue of the plaintiff's claim being based on an illegality, it is my considered view that in order to aptly determine this issue, I will have to consider the evidence adduced by the parties, and the applicable law and arrive at a determination. At this stage, it will be premature to determine the issue of the said illegality, without subjecting the plaintiff's suit to hearing, where evidence will be adduced and be tested in cross-examination. Striking out of a suit and/or pleading is a draconian and drastic measure which should be resorted to sparingly, and with caution. The Court of Appeal in *Crescent Construction Limited vs Kenya Commercial Bank Limited* [2019] eKLR, stated thus on the striking out of suits -

However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honored legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.

24. In the circumstances, and being bound by the aforementioned decision, I am of the considered view that it is in the interest of justice and fairness to allow this suit go to trial, allow witnesses to testify and adduce evidence in support of their cases, and for the main suit to be determined on merits.
25. In the end, this Court finds that the instant application is not merited. It is hereby dismissed with costs to the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF DECEMBER 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Ajak Jok Ajak h/b for Mr. John Mbaluto for the defendant/applicant

Mr. Wafula for the plaintiff/respondent

Ms B. Wokabi – Court Assistant.

