



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 91 OF 2017

FORMAX INSURANCE BROKERS LIMITED.....APPELLANT

- V E R S U S -

GLORY AUTO SERVICES LIMITED.....RESPONDENT

(Being an appeal from the judgment delivered on 8th February, 2017 by Hon. I. Orange, SRM in Nairobi Civil Suit No. 4326 of 2011)

JUDGEMENT

1) Formax Insurance Brokers Ltd, the appellant herein filed an action against Glory Auto Services Ltd, the respondent herein, vide the amended plaint dated 6th October 2014 seeking for *inter alia* a sum of ksh.360,185 plus costs and interest. The aforesaid amount is said to be the outstanding payment of premiums for procured insurance policies. The respondent filed a defence to deny the appellant's claim. Hon. Orange K. I, learned Senior Resident Magistrate heard and dismissed the suit on 8th February 2017.

2) The appellant being aggrieved preferred this appeal and put forward the following grounds:

1. THAT the learned trial magistrate erred in law and fact in failing to recognize that, as at 25th March, 2010, the respondent and other associated companies owed the appellant premium amounting to kshs.2,106,560/- for policies insured by Kenindia Assurance Company Ltd, as admitted by the respondent in the witness statement of Johnson Matara dated 17th October, 2011.

2. THAT the learned trial magistrate erred in law and fact in finding that the memorandum dated 25th March, 2010 applied to the respondent when the same was addressed to M/s Glory Group of Companies.

3. THAT the learned trial magistrate erred in law and fact in failing to dismiss the memorandum dated 25th March, 2010, written by the appellant and addressed to M/s Glory Group of Companies, as evidence of an agreement between the appellant and the respondent when the respondent failed to provide any evidence of its association with M/s Glory Group of Companies.

4. THAT the learned trial magistrate erred in law and fact in finding that the appellant advised the respondent to hold kshs.1,300,000/- against outstanding claim from previous underwriters when the respondent claimed, in the witness statement of Johnson Matara dated 17th October, 2011 that it was ksh.806,560/- that was to be retained by the respondent to cover outstanding claim settlements from Kenindia Assurance Company Ltd.

5. THAT the learned trial magistrate erred in law and fact in failing to note that the respondent had not provided any evidence of outstanding claim settlements from Kenindia Assurance Company Ltd, the previous underwriters, and therefore the respondent was liable to pay the plaintiff the entire amount of premium arrears and for the policies insured by Kenindia Assurance Company Ltd.

6. THAT the learned trial magistrate erred in law and fact in failing to note that the respondent paid ksh.1,300,000/= premium for new policies issued by a new insurer, Jubilee Insurance Company Ltd, which fact was supported by the premium financing agreement produced as evidence by the respondent.

7. THAT the learned trial magistrate erred in law and fact in finding that the respondent's payment of premium amounting to kshs.1,300,000/= to Jubilee Insurance Company Ltd offset the premium arrears for policies issued by Kenindia Assurance Company Ltd which the respondent admitted amounted to ksh.s1,106,560/- in the witness statement dated 17th October, 2011.

8. THAT the learned trial magistrate erred in law and fact in finding that the memorandum dated 25th March, 2010 was a legally binding agreement between the appellant and the respondent when it bore no official stamps or seals from either the appellant or the respondent which are both limited liability companies.

9. THAT the learned trial magistrate erred in law and fact in failing to take note that the respondent never produced any evidence of payment of premium for the policies issued to it by Kenindia Assurance Company Ltd.

10. THAT the learned trial magistrate erred in law and fact in failing to find that the fact that Kenindia Assurance Company Ltd issued policies to the respondent was prima facie evidence that it had received payment of premium from the appellant or that the appellant had made satisfactory arrangements on behalf of the respondent for those policies.

11. THAT the learned trial magistrate erred in law and fact in failing to find that the fact that Kenindia Assurance Company Ltd did not sue the respondent for the outstanding premium was prima facie evidence that Kenindia Assurance Company Ltd received full payment of premium from the appellant on behalf of the respondent.

12. THAT the learned trial magistrate erred in law and fact in failing to find that the respondent owed the appellant the premium arrears as claimed in the suit as the respondent neither denied that it procured policies from Kenindia Assurance Company Ltd nor that these policies were procured through the brokerage service of the appellant.

13. THAT the learned trial magistrate erred in law and fact by failing to award the appellant herein the costs of the suit against the respondent.

14. THAT in all the circumstances of the case, the findings of the learned trial magistrate are insupportable in law and fact and/or on the basis of the evidence adduced.

3) When this appeal came up for hearing, this court gave directions to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. The appellant summoned one Titus Wambua (PW1) to testify in support of its case. PW1 stated that in the year 2012 he assessed the premium Glory Auto Services Ltd (Respondent) should pay. He said he fixed a sum of ksh.791,994/= as the amount payable to the insurer. PW1 said that the respondent paid ksh.119,491/= as the initial instalment and that he credited it a sum of ksh.312,318/= leaving a sum of kshs.360,185/= as outstanding payment of premium. PW1 said that the respondent promised to pay but it has not fulfilled its promise neither had it waived its claim.

4) PW1 stated that the appellant being an insurance broker was entitled to collect premiums and pay the underwriter which in turn pays it a commission. PW1 further stated that the appellant paid money on behalf of the respondent to Kenindia Insurance Company though he did not produce any documentary evidence to prove that. PW1 did not also produce copies of the policy documents as an exhibit in evidence.

5) The respondent summoned Johnson Matara (DW1) to testify in support of its defence. DW1 told the trial court that the respondent appointed the appellant to seek for quotations from various insurance companies and that it chose Kenindia Assurance Co. Ltd and paid for their services. DW1 claimed that Kenindia Assurance Co. Ltd is an insurance on cash and carry basis. DW1 stated that the respondent requested the appellant to renew the Insurance policy with **Jubilee** but not with **Kenindia**.

6) DW1 also claimed that the appellant agreed to waive the claim For the total premium the respondent was to pay hence there was no issue on outstanding premiums to Kenindia. DW1 further stated that he paid all claims on premiums.

7) After considering the competing evidence, the learned Senior Resident Magistrate came to the conclusion that there was no claim as against the respondent and the Insurer. He found that the appellant failed to prove its claim on a balance of probabilities hence he dismissed the action.

8) The question which stands to be answered on appeal is whether The appellant was justified to claim a sum of ksh.360,185/= from the respondent. There is no doubt that the appellant tendered evidence of debit notes demanding payments from the respondent. In its evidence, the respondent stated that the respondent procured various insurance services through the appellant from Kenindia Assurance Co. Ltd. The record also shows that the respondent produced in evidence the memorandum, drawn by the appellant dated 25.3.2010 where the respondent was to pay ksh.1,300,000/= to facilitate a renewal of policies with a new insurer namely Jubilee Insurance Co. Ltd, whilst the outstanding premium of kshs.2,105,560/= was being

held by the respondent to offset outstanding claim settlements from the previous insurers that is Kenindia Assurance Co. Ltd. It is the submission of the respondent that the letter of agreement mentioned earlier entered between it and the appellant, to which the appellant waived premium arrears was to be held by the respondent against the outstanding claim settlements for insurance policies insured by Kenindia Assurance Co. Ltd.

9) The appellant did not deny being the author of the aforesaid letter. It is not in dispute however that the letter of 25.3.2010 bears neither the appellant's seal nor stamp nor that of the respondent. It is therefore doubtful whether the same can be held to bind the parties. It would appear that at the time the respondent was procuring insurance policies from Jubilee Insurance Co. Ltd it had partly paid premium for the insurance policies procured from Kenindia Assurance Co. Ltd.

10) After analysing the material placed before the trial court, it is clear in my mind that the appellant had established its claim as against the respondent on a balance of probabilities. The trial magistrate therefore fell into error when he dismissed the appellant's claim.

11) In the end, I find the appeal to be meritorious. Consequently the same is allowed. The order dismissing the suit is set aside and is substituted with an order of entry of judgment as prayed in the amended plaint dated 6th October 2014.

12) Costs of the suit and the appeal is awarded to the appellant.

Dated, Signed and Delivered in open court this 2nd day of May, 2019.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent