



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 38 OF 2012**

**GETRIO INSURANCE BROKERS LIMITED .....PLAINTIFF**

**VERSUS**

**MWALIMU NATIONAL CO-OPERATIVE SAVINGS &**

**CREDIT SOCIETY ..... 1<sup>ST</sup> DEFENDANT**

**CIC INSURANCE GROUP LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

1. Getrio Insurance Brokers Limited the Plaintiff (hereinafter referred to as Getrio) is a limited liability company registered under the companies Act and engages in the business of providing insurance brokerage services. Mwalimu National Co- Operative Savings & Credit Society as its name shows is a co-operative saving and credit society established under the co-operative societies Act. It shall hereinafter be referred to as Mwalimu. CIC Insurance Group Limited herein after referred to as CIC is a company registered under the companies Act and it is engaged in the business of providing Insurance services.

2. Getrio has, by this action sought permanent injunction to restrain Mwalimu and CIC from making payment of insurance commission in respect of insurance policies placed by Mwalimu with CIC for the period 1<sup>st</sup> January 2012 to 31<sup>st</sup> December 2012. Further Getrio sought judgment for insurance commission against Mwalimu and CIC, jointly and severally for Kshs.12,009,083.10, with interest at 18 per annum. Those claims are denied by Mwalimu and CIC.

3. It is not denied that Mwalimu by undated advert invited tenders “ for the pre-qualification of suppliers of goods and services for the calendar year 2012.” Amongst the services Mwalimu sought was provision of insurance brokerage. It is also not denied that Getrio responded to that invitation to tender for the pre-qualification, in respect to the services of brokerage.

4. Getrio received a letter from Mwalimu dated 19<sup>th</sup> December 2011, and because that letter plays a central role in this matter I will reproduce it as follows:

**“19.12.2011**

***The Director,***

***Getrio Insurance Brokers Ltd,***

***P. O. Box 53172 – 00200***

***NAIROBI***

***Dear Sir,***

**RE: RENEWAL OF INSURANCE POLICIES**

***Subsequent to our earlier pre-qualification exercise carried out at the beginning of this year. You have been given a chance to give us quotations from the underwriters for the Insurance of Fire & Perils, Motor Vehicle Comprehensive & Private.***

***You are required to return your bids before or on 21<sup>st</sup> December, 2011 at 12.00 p.m. in the tender box on 8<sup>th</sup> floor. The tender documents will be opened the same day at 2.00 p.m. so as to enhance the process.***

***Yours faithfully,***

***B.M. Rondo***

***Ag. Chief Executive Officer***

5. Getrio plead in its plaint that CIC wrote a letter dated 21<sup>st</sup> December 2011, addressed to Mwalimu, whereby CIC authorized Getrio to submit CIC's quotation sought by Mwalimu and to sign the resultant contract.

6. The Plaintiff further pleaded that on obtaining "most competitive quotation" for insurance cover from CIC it prepared and submitted its quotation to Mwalimu. By paragraph 8 of its plaint Getrio pleaded:

***"The Plaintiff (Getrio) avers that its quotation as contained (CIC) was evaluated by the 1<sup>st</sup> Defendant (Mwalimu) and found to be successful but instead of placing the said insurance cover through the Plaintiff, the 1<sup>st</sup> Defendant placed the same with the 2<sup>nd</sup> Defendant (CIC) but through a certain broker and agent."***

7. It is the claim of Getrio that having been successfully evaluated by Mwalimu, Mwalimu was required to award it the tender. It claims that Mwalimu's placing of Insurance policies with CIC either direct or through brokerage had denied it the right to earn insurance commission. Getrio particularized Mwalimu's alleged unlawful and/or unfair acts as:

***i. Making an award to other persons and/or entities other than the Plaintiff when the Plaintiffs quotation was the successful one.***

***ii. Awarding the loan guard policy directly to the 2<sup>nd</sup> Defendant when the quotation had been submitted by the Plaintiff.***

***iii. Making an award directly to the 2<sup>nd</sup> Defendant when the 2<sup>nd</sup> Defendant had authorized the Plaintiff to submit the quotation and execute the resultant contract on its behalf.***

***iv. Failing to promote competition and ensure that competitors are treated fairly in the procurement process.***

***v. Failing to promote integrity and fairness in the procurement process.***

***vi. Failing to increase transparency and accountability in the procurement process.***

8. It is on the basis of the above pleadings Getrio seeks judgment for permanent injunctions and for Kshs.12,009,083.10.

9. Mwalimu, through its defence and in denying the claim stated that it was a stranger to Getrio's allegation that it secured competitive insurance cover and further that Getrio in submitting its quotation went beyond the invitation, in the letter of 19<sup>th</sup> December 2011 reproduced above. Further that Getrios quote was unresponsive/unsatisfactory, irregular and did not meet the threshold it had set.

10. Mwalimu referred to its letter of 19<sup>th</sup> December 2011 as an invitation to treat which invitation to treat led to Getrios offer and which offer Mwalimu did not accept and that there was therefore no contract.

11. CIC by its defence pleaded that Getrio, by its quote to Mwalimu, exceeded in the number of policies it was invited to quote for. That the letter dated 21<sup>st</sup> December 2011, which authorized Getrio to quote and contract with Mwalimu on behalf of CIC, should be read together with the letter of 19<sup>th</sup> December 2011. Further that CIC was invited by Mwalimu to present quotation for Insurance Policies, which included loan guard policy.

### **ANALYSIS AND DETERMINATION**

12. In my view, although the parties have presented a number of issues for determination, the three issues however, that will determine this matter are:

***a) Does this Court have jurisdiction over this matter?***

***b) What was the legal effect of Getrio's quote to Mwalimu contained in the letter dated 20<sup>th</sup> December 2011?***

***c) Who will bear the costs of this suit?***

#### **a. Does this Court have jurisdiction over this matter?**

13. Getrio's Learned Advocates, very forcefully in their written submission submitted that this Court has jurisdiction to determine the matter particularly touching on the provisions of the Public Procurement and Asset Disposal Act 2005 (the Act).

14. Getrio argued that Mwalimu was bound by the provision of the Act. That Mwalimu initial invitation to the public was a pre-qualification process as recognized in Regulations 23, 24 and 25 of the Act. That the pre-qualification tender invitation by Mwalimu was to identify and shortlist tenders of pre-qualifying entities prior to them being invited to tender. Getrio further submitted that Mwalimu's letter dated 19<sup>th</sup> December 2011 was an invitation to tender, which invitation could only be directed to those who had been pre-qualified. That Getrio quoted in accordance with Mwalimu's document entitled "The Request for Insurance Quotations"

15. By their written submissions both Mwalimu and CIC submitted that jurisdiction, hereof, was solely exercisable by the Public Procurement Administrative Review Board. Reference was made to Section 93(1) of the Act which provides:

***"Subject to the provisions of this part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed."***

16. I have considered the parties submissions. It is undeniable that Getrio's complaint is centered on the process of awarding tender, by Mwalimu, to entities to provide insurance cover. Mwalimu began the process by inviting for pre-qualification of suppliers of goods and services. Mwalimu, as correspondence show invited not only Getrio but also others to quote from insurance underwrites for specific and insurance policies. In the case of CIC it was requested by Mwalimu to quote for specific insurances, given to them.

17. The thrust of Getrio's case was that Mwalimu, by letter of 19<sup>th</sup> December 2011, and the request for Insurance quotation it was awarded tender to provide insurance cover to Mwalimu but Mwalimu thereafter proceeded to award one cover directly to CIC and others to be provided by CIC through brokers.

18. Getrio therefore by this claim alleged breach of procurement Law. It is because of that and because the Act gives the power of determining such disputes to Public Procurement Administrative Review Board that I find and hold that this Court has no jurisdiction to determine this matter because this dispute, in the first instance, should have been determined by the said Review Board. This was the clear determination of the Court of appeal in a decision cited in the case **JOHN KAKINDU MAKAU V COUNTY GOV'T OF MAKUENI & 6 OTHERS (2018) eKLR**

***"This Honourable Court attention is drawn to the Courts' decision of Weldon K Korir J. in Republic –vs-Public Private Partnerships Petition COMMITTEE (The Petition Committee) & 3 Others Ex Prte APM Terminals (2015) eKLR, Judicial Review Case 298 & 325 of 2015 in which case the Learned judge relied on the case of Kenya Pipeline Company Limited – vs Hyosung Ebara Company Limited & 2 others (2012) eKLR in which the Court of Appeal held,***

***"Judicial review power was to be exercised with restraint in the case of the Public Procurement administrative Review Board. The Review Board was a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it had power to engage an expert to assist in the proceedings in which it felt that it lacked the necessary experience. Section 98 of the Act conferred very wide powers on the Review Board. It was clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act was indeed an appeal. From its nature the Review Board was obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It followed that its decision in matters within its jurisdiction should not be lightly interfered with."***

***"The Public Procurement Regulatory Authority is the body mandated to initiate investigations either on its own motion or through a request in writing by a public institution or any other person. The petitioner does not deny the fact that he has not undertaken any of the above options to have his claim against the Respondents settled by the body mandated under the Constitution to handle matters of the nature of his claim."***

19. Having determined the first issue above I will proceed to consider the second issue, for completeness of the issues before me.

**(b). What was the legal effect of Getrio's quote by letter of 20<sup>th</sup> December 2011 for provision of Insurance policy?**

20. Getrio submitted that the pre-qualification was part of the legally recognized tendering process and that by Mwalimu's letter of 19<sup>th</sup> December 2011 it was offered the tender which it responded by giving a quote by its letter dated 21<sup>st</sup> December 2011.

21. Both Mwalimu and CIC argue that Getrio was requested by letter of 19<sup>th</sup> December 2011 to quote for very specific insurance policies, namely fire and perils, motor vehicle comprehensive and private. That there was therefore, no contract between Getrio and Mwalimu and accordingly that the claim must fail.

22. When Getrios Managing Director, Charles Kimenyi was cross examined he stated that he was unaware that other brokers were invited by Mwalimu, just ad Getrio was invited, to present their quotes for specific insurance policies. This witness also confirmed contrary to what his Learned Advocate submitted, that Getrio in making its quote to Mwalimu submitted quotes which had not been requested by Mwalimu.

23. Again contrary to the submissions of Getrio's Learned Advocate Getrio's Managing Director on being cross examined stated:

***"The 1<sup>st</sup> Defendant (Mwalimu) did not award any tender to (the) Plaintiff (Getrio). Therefore, there is no contract between (the)***

***Plaintiff and 1<sup>st</sup> Defendant.”***

24. Although the Managing Director testified, as set out above, he later stated that Mwalimu evaluated Getrio’s bid and found it to be successful. He however acknowledged that he was unaware what other brokers may have quoted to Mwalimu.

25. Getrio’s witness more than once acknowledged that there was no contract between Mwalimu and Getrio on provision of insurance cover.

26. What is surprising is that even though that witness was so clear and categorical that there was no such contract and that without such a contract the commissions sought in this case by Getrio cannot be awarded the Learned Advocate for Getrio with equal force submitted in writing that Getrio was successful in the tender to provide insurance cover to Mwalimu and that it was therefore, entitled to the Commission sought. I believe it behooves the legal profession to be honest when making submissions before Court. It is not the place for a Learned Advocate to adduce evidence in submission particularly when such evidence in the submissions goes contrary to the viva voce, or other, evidence adduced by the parties. It is downright dishonest for an Advocate to do so. The Court, for the avoidance of doubt, will only be guided by the parties evidence and not by their Advocate’s evidence.

27. Getrio’s Managing Director acknowledged on being cross examined that a broker’s commission is only earned when the broker and the other contracting party sign a contract. This did not happen in this case and it follows that no commission is due or payable to Getrio by any of the Defendants.

28. I also wholly agree with the submissions on behalf of the 2<sup>nd</sup> Defendant that special damages, such as the commission sought in this case, must be specifically proved. There was no proof provided by Getrio, other than the pleading in the plaint, of that commission. In this regard I will refer to the case cited by the 2<sup>nd</sup> Defendant, namely  **MBAKA NGURU & ANOTHER –V- JAMES GEORGE RAKWAR CIVIL APPEAL NO.133 of 1998** Viz:

***“It will suffice to say that Plaintiffs who do not plead their damages properly and then do not prove the same do so at their own risk. They will not get those damages however sympathetic the Court may feel towards them. The rules of pleading and modes of proof must be adhered to.”***

29. That which is stated above is the very fate of this case. Getrio simply failed to prove its special damages and accordingly those special damages will not be granted.

30. Before concluding on this issue I need to say that whether or not CIC wrote the letter dated 21<sup>st</sup> December 2011, addressed to Mwalimu, authorizing Getrio to contract on their behalf, is of no value or effect in this matter because Mwalimu did not offer a contract to Getrio.

31. The other thing needing to be said is that Getrio did not have a right to be offered the tender for insurance cover, over and above other brokers or insurance companies including CIC. The fact Getrio was the broker for Mwalimu for the year 2011 did not give it a privilege to expect it would continue to be Mwalimu’s broker for the year 2012.

32. In response, therefore, to the second issue I find that there was not legal effect to the quote of Getrio to Mwalimu since there was no contract as even envisaged in Section 68 (1) of the Act.

33. On the whole the Plaintiff’s case has failed. Having failed, I do find that costs must follow the event as provided under Section 27 of the Civil Procedure Act.

34. In the end the **Plaintiff’s case is hereby dismissed against both Defendants. The costs of both of the Defendants, of this case, shall be paid by the Plaintiff.**

**DATED, SIGNED and DELIVERED at NAIROBI this 15<sup>TH</sup> day of MAY, 2019.**

**MARY KASANGO**

**JUDGE**

***Judgment Read and Delivered in Open Court in the presence of:***

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE 1<sup>ST</sup> DEFENDANT

..... FOR THE 2<sup>ND</sup> DEFENDANT