



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 39 OF 2017

FORMAX INSURANCE BROKERS LIMITEDAPPELLANT

VERSUS

GRORY HOTELS & INVESTMENTS LIMITED.....RESPONDENT

(Being an appeal from the judgment delivered on 16th January, 2017, by Honourable 1. Orange Senior Resident Magistrate in Nairobi

Civil Suit No. 8352 of 2011)

In

FORMAX NSURANCE BROKERS LIMITED.....PLAINTIFF

VERSUS

GRORY HOTELS & INVESTMENTS LIMITEDRESPONDENT

JUDGMENT

The appeal herein has been brought by the appellant who was the plaintiff in Chief Magistrate's Civil Case Number 3852 of 2011 against the Respondent who was the defendant in the aforesaid case.

By way of an amended plaint, amended on the 6th day of October, 2014, the appellant prayed for judgment against the Respondent for Kshs. 127,081, costs of the suit and interest on account of unpaid premium for insurance policies procured from Kanindia Assurance Company limited by the appellant on behalf of the Respondent in 2009 and 2010.

That the total premiums amounted to Kshs. 134, 347/- out of which the Respondent's account with the Appellant was credited with kshs. 7,266/- for a settled claim, leaving an outstanding balance of kshs. 127,081 aforesaid.

The Respondent denied the claim in its defence filed in court on the 17th October, 2011. Save for admitting that it requested the appellant to use its services to procure insurance policies on its behalf with Kenindia Assurance Company Limited, it denied owing the amount of the premiums claimed by the appellant at Kshs. 127,087. It has also denied that it was issued with debit notes for the same. It has further denied that a sum of Kshs. 7,266/- was credited into it's account by the appellant for a settled claim leaving the claimed balance of Kshs. 127,081.

The Respondent averred that on the 25th March, 2010 they entered into an agreement wherein the Appellant relinquished its claim for outstanding insurance premium and the Respondent waived its outstanding claims settlement against Ms. Kenindia Assurance Company limited. That by virtue of that agreement, it was completely discharged of all claims by the Appellant for the outstanding premiums as at the 25th day of March, 2010.

The Respondent averred that the insurance premiums with effect from the 25th day of March, 2010 was financed by M/S Giro Bank Limited and the applicable installments were duly paid directly to the bank and has put the Appellant to strict proof to the contrary.

A reply to defence was filed on the 31st October, 2011, in which the Appellant joins issues with the Respondent in its defence save where the same consists of admissions. The Appellant averred that the said transfer of the insurance policies was done at the request of the Respondent. That the agreement dated the 25th day of March, 2010 was to facilitate the respondents borrowing through Insurance Premium Finance Scheme with Giro Commercial Bank Limited to pay part of the outstanding premium.

The Appellant contended that it did not relinquish its claim for outstanding premium against the Respondent as alleged in the defence.

The Appellant further pleaded that the Respondent did not waive outstanding claim settlement against M/S Kenindia Assurance Company Limited as no such claims existed as none was lodged and supported by documents as required in law. It contended that at the time arrangements for the Respondent to borrow kshs. 1,300,000 through Giro Bank Limited was made, the outstanding premium was Kshs. 2,106,560/- and the borrowing left Kshs. 806,560/- outstanding and which has not been paid to date. That the subsequent premium arrears were incurred by the Respondent until March, 2011 when the Parties stopped dealings and avers, the same is due and payable by the Respondent to the Appellant. He stated that the Insurance Act Cap 487, does not bar payment of premium where services have been rendered and the same have become due and payable.

At the hearing, Titus Wambua gave evidence as PW1 in support of the Appellants case. It was his evidence that he procured policies for the respondent from Kenindia Insurance Company Limited. That he charged Kshs. 127,081/- for the said policies which he believed the Respondent would pay but which the Respondent failed and/or declined to pay. That the Respondent moved to another insurance company namely Jubilee Insurance Company Limited before the money could be paid. That the Respondent paid a sum of Kshs. 7,266/- only, leaving the balance of Kshs. 127,081 outstanding, despite having made a promise to pay the money.

Johnson Matara testified in support of the Respondent's case as DW1. He works with Glory Group of Companies which consists of many companies. He stated that they have a list of assets to be insured for hotels and car hire and that they take one cover. It was his evidence that the company appointed the appellant to seek quotations for insurance cover and they settled for Kenindia Assurance Company Limited. That they paid for the services offered as the insurance is on cash and carry basis.

He testified that the letter dated 25th March, 2010 was sent when they were renewing insurance, which they did with Jubilee Insurance Company and not Kenindia Assurance Company Limited. That the Appellant agreed to waive claim for the total premium which the respondent was supposed to pay and therefore, there was no issue of outstanding premium.

After hearing the matter, the learned Magistrate dismissed the appellant's case after finding that it did not prove its case on a balance of probability. The said judgment is now the subject of the appeal herein. In its memorandum of appeal filed on 8th February, 2017, the Appellant has listed 14 grounds of appeal. The court has looked at the said grounds and in my view, they can be collapsed into the following grounds;

1. That the learned trial Magistrate erred in law and in fact in failing to find that the Respondent owed the Appellant the premium arrears as claimed in the suit.
2. The learned Magistrate erred in law and in fact in finding that the memorandum dated 25th March, 2010 was a legally binding agreement between the appellant and the Respondent.
3. The learned Magistrate erred in law and in fact by failing to award the Appellant herein the costs of the suit against the respondent.
4. The learned Magistrate erred in law and in fact in reaching a conclusion that was not supported by law and the facts of the case.

The Appellant has urged the court to allow the appeal and set aside the judgment delivered on the 16th January 2017, and all the consequential orders arising there from and allow the appeal. It has also sought for the costs of the appeal.

When the appeal came up for hearing, parties agreed to canvass the same by way of written submissions which they duly filed.

As stated elsewhere in this judgment the appeal revolves around the issue of whether the amount claimed by the appellant is owing to him and the implication of the memorandum dated the 25th March, 2010. The question that we need to ask is whether the Appellant proved its case on a balance of probability as required in civil cases.

The court has considered the grounds of Appeal and the submissions as filed. I have also re-evaluated the evidence adduced before the trial court as expected of the Appellate Court. I now proceed to consider the grounds of Appeal which I will consider together because they are all related.

It is not in dispute that the respondent requested the Appellant to use its services to procure insurance policies on its behalf with Kenindia assurance Company Limited, which the Appellant did. The Premiums for the said policies was Kshs. 134,347/- and the Respondent was issued with debit notes. The said debit notes can be seen from pages 152 – 161 of the record of appeal. They were issued by the appellant to Glory Hotels and Investments Limited for different motor vehicles.

The main issue in this Appeal is whether the Respondent owes the Appellant the premium arrears in the sum of Kshs. 127,081. The brief history of the matter being that in the year 2009 and 2010 the Respondent approached and requested the Appellant to procure Insurance Policies on its behalf with Kenindia Insurance Company Limited to which, the Appellant duly complied and obtained covers for the Respondent's motor vehicles which were twelve (12) in total. The total premium payable by the Respondent was kshs. 134,347 to which the Appellant issued the Respondent with debit notes demanding the payment as can be seen on pages 152 – 161 of the record of Appeal.

That in the year 2011, Kenindia Assurance Limited paid a claim under the Work Injury Benefits Act (2007) for Kshs. 7,266/- which led to a credit being made in favour of the Respondent thereby leaving a balance of kshs. 127,081/- owing to the Appellant which it claimed in the lower court. That the Appellant demanded the amount through a letter dated 5th July, 2011 but the Respondent refused and/or failed to pay

hence the suit before the Lower Court which was filed by way of a plaint dated 17th August, 2011 and amended on the 6th October, 2014.

It is the Appellant's submissions that the Respondent has not denied that it procured the services of the Appellant to procure the aforesaid Insurance policies from Kenindia Insurance Company Limited. The Respondent has denied owing the amount claimed by the Appellant. The denial is based on a letter dated 25th March, 2010 wherein the Appellant is said to have relinquished its claim for outstanding insurance premium and that the Respondent waived its outstanding claim settlements against Kenindia Insurance Company Limited.

In his judgment the learned Magistrate held that the letter dated 25th March, 2010 was a valid agreement between the Appellant and the Respondent and that it allowed the Respondent to hold the Kshs. 1,300,000 against outstanding claims from previous underwriters.

The Appellant contended that the learned Magistrate erred in failing to recognize that the Respondent admitted to the court that, it, and other associated companies owed the Appellant premium arrears amounting to Kshs. 2,106,560/- and that it contradicted itself as to how much of the arrears it was to retain to cover the outstanding claims. The Appellant relied on the evidence of PW1 in which the witness stated that the Respondent and the other sister companies owed the Appellant Kshs. 2,106,560/- in premium arrears for insurance policies issued by Kenindia Insurance Company Limited which amount included the Kshs. 127,081 claimed in the amended plaint.

The Appellant contended that the evidence of DW1 amounted to unequivocal admission that the Respondent had premium arrears due to the Appellant which evidence was not considered by the trial Magistrate in arriving at his decision.

The Appellant argued that the Kshs. 1,300,000/- paid to the Appellant in 10 monthly installments were financed by Giro Bank which was still part of Insurance policies issued to Kenindia Assurance Company Limited but which payments were made to Jubilee Insurance Company Limited and not Kenindia Insurance Company Limited; which meant that the Kshs. 2,106,560/- the Respondent admitted as owing to Kenindia Assurance was still unpaid. The Appellant has faulted the trial Magistrate for failing to consider this evidence.

The Appellant also faulted the learned Magistrate for failing to note that the Respondent had not provided any evidence of outstanding claim settlements from Kenindia, the previous underwriters, and therefore the Respondent was liable to pay the Appellant the entire amount of premium arrears for the policies issued by Kenindia. That the memorandum dated the 25th day of March, 2010 stated that the premium arrears owing to the Appellant by the Respondent was to be held by the Respondent against outstanding claim settlements from Kenindia the reason being that, the Respondent had made representations to the Appellant that they had claims under the policies issued by Kenindia which were to be settled by the insurer but no such claims were presented to either the Appellant or the insurer. The Appellant submitted that the representations made by the Respondent that it had claims to be settled by the Kenindia were false and the Respondent was all along avoiding paying the premium arrears it owed the Appellant. That the Respondent failed to prove such claim as required under Sections 107 (1) and 120 of the Evidence Act and therefore the Respondent was estopped from denying later that it had made such representations. The Appellant argued that the Respondent's claim that the Appellant waived the outstanding claim settlement under Kenindia is not tenable as it is the duty of the insurer to determine the amounts payable in settlement of a claim and not any other party.

It also argued that the memorandum dated 25th March, 2010, does not bear any official stamps or seals from the Appellant and the Respondent which are both limited liability companies and averred that none of them are addressed to glory Group of Companies. The case of *Agricultural Finance Corporation vs. Lengetia Limited (1985) KLR* and that of *Halima Abdinoor Hassan & 3 others vs. Corporate Insurance Company Limited, Civil case No. 96/2004* were cited.

The Appellant urged the court to consider that the fact that Kenindia issued Insurance policies to the Respondent and did not sue the Respondent for premium arrears for those policies was prima facie evidence that it had received payment of the said premiums from the Appellant or that the Appellant had made satisfactory arrangements for payment. The provision of Section 156(a) of the Insurance Act was invoked by the Appellant.

On its part the Respondent submitted that as per Section 156(2) of the Insurance Act, the Appellant as a broker cannot collect premiums in its name and that there was no evidence that the Appellant was receiving the premiums on behalf of Kenindia. That the Appellant has not demonstrated that it has authority of Kenindia to recover the alleged outstanding premiums on its behalf.

It averred that it was in breach of section 156(1) and 41 of the Insurance Act for Kenindia to have issued Insurance policies before receiving full premiums or in the absence of appropriate bank guarantee from a licensed bank and therefore such an illegal contract cannot be enforced by the court. The case of *Mapis Investment limited vs. Kenya Railway Corporation CA. No. 14/2005* was relied on and that of *Standard Chartered Bank Vs. Intercom Services Limited and 4 others* which was cited in the case of *Kenya Pipeline Company Limited Vs. Glencore Energy Limited (2015) e KLR*.

The Respondent further argued that the Appellant was well aware of Section 156 of Insurance Act and by admission, and with the same knowledge of the law, it is clear that the Appellant had not paid premium to Kenindia Insurance Company and yet it is pursuing the Respondent to pay and there is no amount owing to the Appellant. It has cited section 2(1) of the Insurance Act on the definition of who a broker is. It argued that the work of a broker is limited to that of an intermediary; and its work is not to pay premiums on behalf of an insured and in any event, there is no proof that the Appellant paid the premiums to Kenindia. It has urged the court not to re-write the agreement for the parties because they voluntarily entered into it. The case of *Elsion Plastics (K) Limited Vs. Natural Water Conservation and Pipeline corporation, HCC Civil suit No. 641/2009* was cited to buttress that point.

Submitting on the memorandum dated 25th March, 2010 and the assertion by the Appellant that the same is not valid, the Respondent stated that the agreement was the basis upon which the loan facility was given and therefore, the Appellant cannot now question its validity when it does not favour them as they cannot have their cake and eat it at the same time.

The Respondent argued that the learned Magistrate's finding that the contents of the memorandum dated 25th March, 2010 clearly settled the

issues of unpaid premiums was the correct one. They argued that section 12 of the evidence Act and section 156 (1) (2) of the Insurance Act renders the Appellant's case extremely frivolous. They distinguished the authorities relied on, by the appellant and submitted that they are not relevant in this case. They urged the court to dismiss the appeal.

The court has considered the memorandum of Appeal and the submissions by the respective parties. I have also looked at the memorandum dated the 25th March, 2010. The same was written by the appellate on its letter heads. In it, the appellant refers to outstanding claims settlement to the respondent by M/S Kenindia Assurance Company Limited. The Respondent has denied existence of any such claims.

The memorandum refers to a telephone conversation between the writer and presumably with Mr. Hasnain Noorare to whose attention it is marked and it states in part;

“.....as agreed cautiously, the outstanding premium is reflected at Kshs. 2,106,560/0 you are to finance the premium amount of Kshs. 1,300,000, since the remaining amount is to be held by yourselves against the outstanding claim settlements from your previous underwriter Ms. Kenindia Assurance Company Limited.

The appellant has claimed Kshs. 127,081 which was the balance left after crediting the respondents account with Kshs. 7,266/- from the initial debt of Kshs. 134,347/-.

The appellant has pegged its claim on the memorandum dated the 25th March, 2010. It is worth noting that what is attached as evidence of the transactions are the debit notes. As rightly submitted by counsel for the Respondent, there is no evidence tendered before the court to prove that the appellant paid the premiums to Kenindia Assurance Company limited on behalf of the respondent. Further, there is no agreement and/or evidence to demonstrate that the appellant is recovering the premiums on behalf of Kenindia Assurance Company list or that it has authority from Kenindia to do so.

A cursory refusal of the memorandum dated 25th March, 2010 would reveal that parties had intentions of being bound by the contents of the same and infact it refers to a telephone conversation between them. The appellant was the author of the letter and therefore, it cannot run away from it. The debit notes refers and are addressed to Group of companies which means that there is a connection between the Respondent and the said company.

The appellant brought the claim against the respondent. It is trite law that whoever alleges must prove. It was its duty to prove the claim against the respondent. It ought to have produced evidence before the court showing that it paid the premiums on behalf of the Respondent or that its commissions was deducted to set off the premiums. Nothing would have been easier that for it to attach such evidence which it failed to do. The name of its claim is a special damage claim. The law is very clear on proof when it comes to such claim. It has to be specifically pleaded and strictly proven. This was not done. To the contrary, the appellant expected the respondent to disprove its claim which should not be the case.

In the end, I find that the learned magistrate properly analyzed the law and the facts before him in arriving at the conclusion that he did. I therefore do not find any reason to interfere with his decision.

In the circumstances, the appeal is hereby dismissed but with no orders as to costs. The judgment by the trial magistrate is hereby upheld.

Dated, Signed and Delivered at Nairobi this 4TH Day of JULY, 2019

.....

L. NJUGUNA

JUDGE

In the Presence of

..... For the Applicant

..... For the Respondent