REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 310 OF 2015

FORMAX INSURANCE BROKERS LIMITED.....APPELLANT

VERSUS

GLORY CAR HIRE TOURS & SAFARIS LIMITED....RESPONDENT

(Being an appeal from the judgment delivered on 3rd June, 2015 by Hon. M. Chesang (Resident Magistrate) at Chief Magistrate's Court at Milimani Commercial Court Civil Case No. 5811of 2011)

JUDGMENT

1. The Appellant, Formax Insurance Brokers Ltd sued the Respondent, Glory Car Hire Tours & Safaris Ltd vide a plaint dated 25th November, 2011 for the a sum of Ksh.440,683. The Appellant claimed that the said sum was the outstanding balance of premiums for insurance policies issued to the Respondent.

2. The claim was denied. It was stated in the statement of defence that the parties herein entered into an agreement wherein the Appellant relinquished it's claim of the outstanding insurance premiums and the Defendant waived its outstanding claim settlements.

3. The Appellant filed a reply to the defence and joined issues with the Respondent and reiterated the contents of the plaint.

4. After hearing the case, the trial magistrate dismissed the Appellant's case. That is what triggered this appeal.

5. The grounds of appeal are as follows:

1. That the learned trial magistrate erred in law and fact in failing to take into account and to consider the evidence adduced on behalf of the Appellant.

2. That the learned trial magistrate erred in law and fact in finding that the memorandum dated 25th March, 2010 between the Appellant and Glory Group of Companies (Nrb) was a binding agreement between the Appellant and the Respondent herein.

3. That the learned trial magistrate erred in law and fact in finding that the premium arrears of Ksh.440,683/= was to be held by the Respondent against outstanding claim settlements from the previous underwriters without considering that the Respondent failed to make documented claims for settlement as required by the Insurance Act.

4. That the learned trial magistrate erred in law and fact in finding that the issue of whether or not the Respondent spent the premium arears to settle outstanding claims was not an issue at the hearing despite the fact that this issue was raised in the pleadings.

5. That the learned trial magistrate erred in law and fact in finding that the Appellant's claim for premium arears for insurance policies issued by Kenindia Assurance Company Ltd would undo the Premium Financing Agreement entered into by the Respondent herein with Giro Commercial Bank Ltd for the financing of insurance policies procured by the Respondent from Jubilee Insurance Company Ltd.

6. That the learned trial magistrate erred in law and fact in failing to consider that the Appellant's claim was for premium

arrears for insurance policies taken up by the Respondent from Kenindia Assurance Company Ltd and not Jubilee Insurance Company Ltd, and that the Appellant's claim would not affect the Premium Financing Agreement entered into by the Respondent herein with Giro Commercial Bank Ltd for the financing of insurance policies from Jubilee Insurance Company.

7.That the learned trial magistrate erred in law and in fact in not appreciating and/or disregarding the Appellant's Plaint, Reply to Defence and submissions by finding in favour of the Respondent herein.

8. That the learned Judge erred in law and fact by failing to award the Appellant herein the costs of the suit against the Respondent.

9. 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."

6. The appeal was canvassed by way of written submissions. I have considered the said submissions.

7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".

8. PW1 Titus Nzioka Wambua testified on the Appellant's side. He adopted his witnesses statement as his evidence. PW1 described the Appellant as a company which carries out insurance business as agents for several insurance companies. That in the year 2008, 2009 and 2010, they were acting as agents for Kenindia Assurance Company Ltd. That the Respondent requested them to undertake insurance for all risks for video equipment, computers, radios, cameras, generators, phones and accessories. The policy was also to cover fire and allied perils, fidelity guarantee, public liability, cash in transit, burglary and work injuries benefits. That the total premium was Ksh.3,078,874/=

9. PW1 further testified that the Respondent paid the sum of Ksh.2,208,418/= and was also credited with Ksh.429,773/= leaving a balance of Ksh.440,683. He produced debit notes, credit notes and a summary statement of the transactions. He maintained his evidence during cross-examination.

10. DW1 Johnson Matara testified on the Respondent's side. He adopted his witness statement as his evidence. It is stated that the Respondent procured various insurance services through the Appellant from Kenindia Assurance Co. Ltd. That as at the 25th March, 2010, the amount of premium owing to the Appellant stood at ksh,2,106,560/=. That it was agreed that a sum of Ksh.806,560/= be retained by the Respondent to cover outstanding claim settlements from Kenindia Assurance Co. Ltd. That therefore the amount payable to the Respondent was Ksh.1,300,000/= which the parties agreed was to be paid in ten (10) monthly installments through financing by Giro Bank which amount was cleared. DW1 produced as exhibits a letter dated 25th March, 2010, the Premium Financing Agreement and Payment Vouchers. He maintained his line of evidence during cross-examination.

11. The Appellant submitted that with the Respondent having admitted having procured insurance policies in question using the Appellant's brokerage services, it should have paid the premium arrears. The Appellant relied inter alia, on the case of **Benjamin Onkoba Nyaachi & another v Victoria Insurance Brokers, Civil Appeal No 75 of 2004 unreported** where the Court of Appeal stated as follows:

"...as the appellants did not deny having received the services through the brokerage of the respondent, we find it unacceptable for the Appellants to refuse to pay for the services rendered, allegedly because the brokers were their agents. In law the respondent broker remains the agent of the insured appellants. There is no law which prevents an agent from recovering anything retained by an insured where the broker has incurred such an expense on behalf of an insured.

12. The court was also referred to the persuasive case of **Sedgwick Kenya Insurance Brokers Ltd v Kenol Kobil Petroleum Ltd & another, Civil Case No. 355 of 2010 eKLR,** the High Court held as follows:

"the Plaintiff herein as the insurance broker is directly responsible to the underwriter and therefore has the right to sue the insured for recovery of the outstanding premium."

13. The court was referred to Section 156(1) of the Insurance Act provides that:

"no insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed, or unless and until a deposit of a prescribed or unless and until a deposit of a prescribed amount, is made in advance in a prescribed manner."

14. It is was submitted that in this case the Respondent had paid part of the premium for the insurance policies, that is, Ksh2,208,418/= which

was a significant amount in light of the total premium payable. That a risk arose under these insurance policies and the Respondent is liable to complete paying the premium. That Section 156(5) of the Insurance Act goes further to provide that "the requirements of this section 156 may be relaxed by regulations in respect of particular categories of the policies."

15. Further reliance was placed in the decision of the High Court in the case of **Jack and Jill Supermarket Ltd v Intra Africa Assurance Company Ltd & another Civil Suit No. 19 of 2003 eKLR** where it was held that it was not mandatory for the Plaintiff to have paid the full premium before the risk arose and the 1st Defendant was therefore liable to compensate the plaintiff for a loss suffered under that policy despite the fact that at the time of filing the suit, the Plaintiff had not completed paying premium.

16. On the other hand, the Respondent submitted that the letter dated 25th March, 2010 settled the issues of unpaid premium and relied on the principle of estoppel. It was further submitted that the Insurance Act forbids agents (brokers) from collecting insurance premiums in their names and from issuing policies before the premium is fully paid.

17. In the case at hand, it is not in dispute that the Respondent received the Appellant's services. The services rendered must be paid for.

18. The plaint in No 3 states that names the Respondent (Defendant), as Glory Car Hire & Safaris Ltd, procured through them the insurance policies from Kenindia Assurance Company. The plaint in paragraph 4 further talks of an agreement between itself and the Respondent as having agreed at the premiums of the said policies would be Ksh.3,078,874/= and the payment made as Ksh.2,208,418/= and credited for Ksh.429,773/= leaving an outstanding balance of Ksh.440,683/=. These pleadings are supported by the evidence of their witness, PW1. Titus Nzuki Wambua.

19. Turning to the Appellant's list of documents produced, the risk notes cum debit notes reflect the insured as "Glory Tours & Safaris Ltd and/or Glory Hotels and Investments and/or Glory Driving School and/or Associated companies.

20. The debit notes and endorsements also reflect the same names.

21. The same applies to the description of the insured in the memorandum dated 25th March, 2010 which is addressed to "Glory Group of Companies (NRB)" which talks about the insurance premium finance for outstanding premium for renewal of the policies with Jubilee Insurance. The said letter states in part as follows:

> **"...As agreed, although the outstanding premium is reflected as Ksh.2,106,560/=, you are to finance the premium amount of Ksh.1,300,000/=, since the remaining amount is to be held by yourselves against outstanding claim settlements from your previous underwriters M/s Kenindia Assurance Co. Ltd.**
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> **Kindly therefore complete the finance form and return to our offices along with one current and nine subsequent monthly postdated cheques for Ksh.135,460/= each in the name of Giro Bank."**

22. The position in this memorandum is confirmed by the Premium Finance Agreement between the Respondent and Giro Commercial Bank Ltd.

23. Although the Appellant's submissions are that this is not a binding agreement as it does not meet the ingredients of a contract, it is noted that the parties acted on the said terms as per the payment through Giro Bank. Therefore estoppel comes in.

24. The memorandum dated 25th March, 2010 addressed to Glory Group of Companies Nairobi though argued by the Appellant that there is no evidence that it is associated with the policy the subject of the matter is supported by the Appellant's own documents. That is the risk notes/ debit notes and the debit notes cum endorsement notes produced herein. Taking the Appellant's arguments that their claim is against the Respondent herein only, then the said documents cannot be said to support the Appellant's claim as the insured is not described as the Respondent herein. There is no evidence tendered to reflect what was insured for each of the different companies named as the insured. On the other hand, the statement of transactions names the Respondent only and therefore contradicts the debit/credit notes.

25. The reply to defence talks of the agreement of 25th October, 2010. The Appellant cannot therefore approbate and reprobate.

26. The evidence adduced by the Appellant fails to shed light on the aforestated gaps in their documents. It seems the documents were just produced as exhibits and left to the court to make sense of the same. As stated in the case of **Bid Insurance Brokers Limited v British United Provident fund [2016**]while citing the case of **Kenya Breweries Limited Kiambu v General Transport Agency Limited [2000] eKLR,** the court said;

> **"It is the duty of the Plaintiff to prove its claim for damages as pleaded. It is not enough simply to put before the court a great deal of material and expect the court to make a finding in his favour. It was said by Lord Goddard, CJ in Bonham Carters Hyde Park Limited [1948] 64TR 177**
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> **The Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to write down particulars and, so to speak, throw them at the head of the court, saying. "this is what I have lost, I ask you to give me these damages." They have to prove it."**

27. Taking into account the memorandum between the parties, the same supports the Respondent's position that from the 25th March, 2010 the premium owing from the Respondent was as stated therein and that there was no balance left outstanding.

28. The Appellant has argued that the said memorandum dated 25th March, 2010 was merely to facilitate the financing of the premiums by the bank for the cover by Jubilee Insurance Company. If that was so, then the question is which documents support the Appellant's claim since the insured in the documents produced refer to Glory Car Tours & Safaris Ltd and or Glory Hotels and investments and or Glory Driving School and/or associated companies.

29. He who alleges must prove. Section 107 (1) Evidence Act Cap 80 provides as follows:

> **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"**

30. The burden was on the Appellant to prove its case. This court is not satisfied that the Appellant proved its case on a balance of probabilities. I find no merits in the appeal and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 13th day of Nov., 2018

B. THURANIRA JADEN

JUDGE