



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 292 OF 2016

BECKY JEPKEMOI CHERUIYOT T/A BIL BECAR INSURANCE AGENCY.....APPLICANT

V E R S U S

HERITAGE INSURANCE COMPANY.....1ST DEFENDANT

CLERK TURKANA COUNTY ASSEMBLY.....2ND DEFENDANT

RULING

1. The subject matter of this ruling is the 2nd defendant's Preliminary Objection dated 3rd February 2017 in which the 2nd defendant sought for the plaint to be struck out for the following reasons:

i. The suit is filed in contravention of Sections 27, 28 and 167 of the public Procurement and Asset Disposal Act of 2015.

ii. That this court has no jurisdiction to entertain the suit.

iii. There is no cause of action disclosed against the 2nd defendant.

2. When the matter came up for the interpartes hearing of the motion dated 7.11.2016, learned counsels recorded a consent order to have the preliminary objection determined first and by way of written submissions.

3. I have considered the material placed before this court and the rival submissions. The history behind this suit is straightforward. The County Assembly of Turkana invited bids for the provision of *inter alia* medical cover of its staff. A total of seven (7) insurance companies applied for the tender. In the end the tender was awarded to Heritage Insurance company, the 1st defendant herein. Becky Jepkemoi Cheruiyot, t/a Bil Becar Insurance Agency, the plaintiff herein avers that her firm is the agent/broker of the 1st respondent. The plaintiff avers that her firm tendered and won the aforesaid tender on behalf of the 1st respondent therefore she is entitled to be paid as per the agency agreement. The plaintiff avers that she has discovered that the tender is being secretly transferred to another person whose quotation was higher than that of her firm. The plaintiff is now before this court seeking to restrain the 1st defendant from paying any other agent/broker any commission in respect of the tender vide the plaint dated 7th November 2016. The plaintiff has now taken out the motion dated 7th November 2016 in which she is seeking for temporary orders of injunction to restrain the 1st defendant from making payments to any other agent/broker any commission in respect to the aforesaid tender. The plaintiff has also sought for an order to compel the clerk, Turkana County Assembly, the 2nd defendant, to provide the details of the agents who tendered and who won the tender for the provision of the medical insurance cover for the

Turkana County Assembly.

4. The 2nd defendant has now urged this court to strike out the suit on the basis of the grounds stated on the face of the notice of preliminary objection. The most serious ground raised and argued is the ground touching on the jurisdiction of the court to entertain this suit. The 2nd defendant has put forward very strong grounds to have the suit struck out. The 2nd defendant has basically cited Sections 27, 28 and 167 of the Public Procurement and Asset Disposal Act, 2015 (PPADA). It is the argument of the 2nd defendant that Section 28 of the PPADA, the dispute herein can only be filed before the Public Procurement Administrative Review Board.(PPARB) a specialized tribunal to deal with all complaints relating to tender processes. Under Section 27 PPADA any person aggrieved by the decision of PPARB may file an appeal to a central independent procurement appeals review board and the decision of the appeals review board may be challenged before the High Court by way of Judicial Review.

5. It is for the above reasons that this court has been asked to strike out the suit. The plaintiff opposed the preliminary objection arguing that she did not breach any law that governs procurement related disputes. Having considered the rival arguments, it is clear to me that the dispute before this court is unique in its own way. To start with, I do not think the suit seeks to challenge the decision to award the tender to Heritage insurance company. In my understanding, I think the dispute here is between the agents and brokers who procure tenders on behalf of Heritage Insurance Company. Those agents/brokers are not the actual parties who win and awarded the tender. They simply do the work on behalf of their principal, the insurance company at a commission paid by the insurance company. The dispute here is simply a contract entered between the insurance company and its agents/brokers. This relationship is not covered by the public Procurement and Assets Disposal Act. I find the preliminary objection based on this ground to be unsustainable.

6. The other ground which was ably argued by the parties is whether or not the plaintiff has any cause of action against the 2nd defendant. It is the argument of the 2nd defendant that the plaint does not contain any allegation as against the 2nd defendant therefore the suit is not sustainable. It is also argued that the 2nd defendant is not privy to the agreement between the plaintiff and the 1st defendant therefore there is no cause of action against the 2nd defendant.

7. The plaintiff has argued that the 2nd defendant did not provide her with the tender documents and the forwarding letter to prove the documentation of the alleged tender given to Linda Libese the alleged winner. The plaintiff further argued that the 2nd defendant's tender had irregularities which denied her the award of the tender. I have considered the rival arguments. I have also critically examined the entire plaint dated 7.11.2016 and apart from paragraphs 3 and 9, the 2nd defendant is not mentioned anywhere. Those paragraphs were merely descriptive of the 2nd defendant.

8. With respect, I agree with the 2nd defendant's submission that there is no allegation directed against the 2nd defendant in the plaint. There is no remedy which the plaintiff has sought against the 2nd defendant. In my humble view, the suit as against the 2nd defendant is in breach of Order 4 rule 5 of the Civil Procedure Rules, 2010. The plaintiff did not show the 2nd defendant's interest and liability in the dispute. This omission is fatal if the plaintiff does not seek to amend the plaint. In this matter, the plaintiff was invited through the written submissions to state whether the plaint complies with Order 4 rule 5 of the Civil Procedure Rules but she decided to seek for the easier remedy of amendment. I earlier stated that the dispute herein is purely a dispute between an insurance company and its insurance agents and or brokers. The 2nd defendant did not play any role in influencing the relationship. I am convinced that the 2nd defendant has properly grounded its preliminary objection against the suit.

9. In the preliminary objection, the 2nd defendant is seeking to have the suit struck out on the basis that this court lacks jurisdiction to entertain. I find this particular objection to be without merit. However the preliminary objection seeking to have the suit struck out as against the 2nd defendant on the basis that there is no cause of action to be meritorious, it is upheld and sustained. For avoidance of doubt, the suit

as between the plaintiff and the 1st defendant subsists. The plaintiff is directed to have the pleadings amended within 14 days to give effect to the decision of this court. The 2nd defendant's costs to await the outcome of the suit between the plaintiff and 1st defendant.

Dated, Signed and Delivered in open court this 9th day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant