



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 1 OF 2013

DISNEY INSURANCE BROKERS LIMITED PLAINTIFF

V E R S U S

MOMBASA COUNTY DEFENDANT

RULING

1. Plaintiff has sued the Defendant claiming Kshs. 62,052,121/- being the amount due in respect of the Plaintiff's supply of insurance cover to the Defendant. Plaintiff plead that by agreement both oral and in writing with the Defendant Plaintiff agreed to supply Insurance cover for various motor vehicles, including motor cycles, commercial vehicles, private vehicles and fire engines of the Defendant; and further agreed to provide Insurance cover against fire, burglary and fidelity. The Plaintiff pleaded that it supplied those Insurance covers between the years 2011 and 2012. The total costs of the covers was Kshs. 58,712,121/-.
2. Defendant by its Amended Defence denied Plaintiff's claim. Defendant by that Defence stated that Plaintiff's contract was subject to the Public Procurement and Disposal Act 2005 and that as such parties could not enter into a contract without formal contract as required under that Act. That that Act also forbids the Defendant to award a contract in a form of letter or in oral.
3. Plaintiff's Notice of Motion dated 15th August 2013 is for summary judgment to be entered for Kshs. 62,052,121/- as prayed in the plaint. In support of the application Plaintiff reiterated its claim as set out in the plaint. Plaintiff attached to the supporting affidavit an Agreement between it and The Municipal Council of Mombasa, the predecessor of the Defendant, for the provision of various Insurance covers. That agreement broke down different categories of Insurance cover the Defendant required and it indicated the total amount of premiums to be paid by Defendant as Kshs. 11,356,767/-. It is important to note that the agreement mentioned documents that were to be deemed to form and to be read together with the agreement, which Plaintiff has not provided to this Court in making its application. Those documents required to be read together with the agreement are-
 - a. **the price schedule by the bidder;**
 - b. **the schedule of requirements and delivery schedule;**
 - c. **the technical specification;**
 - d. **the purchaser's Notification award**
4. Plaintiff attached to the application a letter dated 1st August 2012 written by Town Clerk of

Defendant's predecessor and it was in the following terms-

“W3/1(C) VOL.1/133/2012

DATE: 1st August, 2012

M/s. Disney Insurance Brokers Limited,

P.O. Box 3600-0200,

NAIROBI

REF: EXTENSION OF MOTOR VEHICLE INSURANCE COVERS

This is to inform you that the Tender Committee in its 16th meeting approved for the extension of Motor vehicle insurance covers for three months with effect from August to October. Please NOTE that the conditions of the contract remain the same.

Tubman Otieno

TOWN CLERK.”

5. Another letter relied upon by Plaintiff is dated 13th August 2012 written, again by the Town Clerk and Town Treasurer in the following terms-

“S.2/TT/GEN/012

13th December, 2012

The Managing

Disney Insurance Brokers Limited

P.O. Box 3600-0200

NAIROBI

OUTSTANDING PREMIUM – KSHS. 59 MILLION

We sincerely apologize for not making good the payment of insurance premium now standing at Kshs. 59 million.

This has been occasioned by poor cash flows and unexpected emergency payments.

We commit to pay Kshs. 5 million per week effective 17th December 2012 until the debt is repaid.

Thank you for your support.

Tubmun Otieno

John Ngugi

TOWN CLERK

TOWN TREASURER”

6. Plaintiff filed a further affidavit in support of his application whereby he attached the Tender Notice newspaper advert. Plaintiff deposed it tendered to No. 21 on that list, which was **‘Provision of Insurance Services.’** The newspaper cutting has no date but it specifies that Tenders were to be deposited at Town Clerks office by 15th June 2011. Plaintiff also relied on Defendant's letter of acceptance of Plaintiff's tender for provision of Insurance services for the period 2012 to 2013. It is not clear whether that period is part and parcel of the Plaintiff's claim,

because it will be recalled that Plaintiff pleaded in the plaint that its claim was for the period of 2011 to 2012.

7. Plaintiff submitted that Defendant's Amended Defence did not raise any triable issues that could go to trial, in the light of the Defendant's predecessor's letter whereby the debt was admitted. Plaintiff submitted that its claim is well supported by the holding in the case **SETRAMACO INTERNATIONAL LTD -Vs- BOARD OF DIRECTORS/HEADTEACHER LUBIRI SECONDARY SCHOOL & ANO. (2011)I EA.** This is a case of the High Court of Uganda where the Court expressed itself-

“There is no express provision in the Public Procurement and Disposal of Public Assets that states that non-compliance with the Act makes a contract illegal and or indeed unenforceable.”

Plaintiff's learned Counsel therefore argued, that even if the contract between the parties did not comply with the provisions of the Public Procurement and Disposal Act 2005, the contract between them was in any case enforceable as per the above decision.

8. Defence's authority was the case **CIVIL APPEAL NO. 11 OF 2000 KENINDIA ASSURANCE COMPANY LIMITED VS COMMERCIAL BANK OF AFRICA LIMITED AND 2 OTHERS** (unreported) where the Court of Appeal stated as follows-

“The Law on summary judgment procedure is now settled. This is a procedure to be resorted to in the clearest cases. In DHANJAL INVESTMENTS LIMITED V SHABAHA INVESTMENTS LIMITED (CIVIL APPEAL NO. 232 OF 1997 (unreported) this Court state-

“The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandnlal Restaurant V Devshi & Co. (1952) EACA 77 and followed by the Court of Appeal for Eastern African in the case of Sonza Figuerido & Co Ltd v Mooring Hotel Limited [1952] EA 425 that, if the Defendant shows a bona fide triable issues he must be allowed to defend without conditions ...”

And in Provincial Insurance Company of East Africa Limited now known as UAP Provincial Insurance Limited v Lenny M Kivuli Civil Appeal No. 216) unreported), this Court again stated:-

“In an application for summary judgment even one triable issue if bona fide, would entitle the defendant to have unconditional leave to defend.”

Lastly, in Kenya Trade Combine Ltd vs M M Shah (Civil Appeal No. 193 of 1999) (unreported), this Court said:

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”

ANALYSIS

9. In the case **UAP PROVINCIAL INSURANCE LTD -Vs- LENNY M. KIVULI (Civil Appeal No. 216 of 1996)** the Court of Appeal in discussing summary judgment application stated-

“In an application for summary judgment even one triable issue if bona fide; would entitle the defendant to have unconditional leave to defend.”

Is there any triable issue raised hereof?

10. It will be recalled that Defendant denied Plaintiff's claim and put to

question the validity of the contract relied upon by the Plaintiff. The Defendant even questioned the authenticity of the pre-suit letter attached to the application admitting the Plaintiff's claim. With those

issues raised by Defendant the Plaintiff had a burden to prove that they did not amount to triable issues.

11. In looking at Plaintiff's claim I first find that even the very agreement

relied upon by the Plaintiff fails to attach documents which it requires to be read together with the contract. It is not clear whether if those documents were to be put before Court the Court would find that the Plaintiff is or is not entitled to the present claim.

12. Further the Plaintiff pleaded that the contractual period for the

provision of the Insurance cover was for the years 2011 to 2012. There is no invoice or demand notice by the Plaintiff Company to the Defendant attached to the Plaintiff's application. Plaintiff does not even attach the insurance policies, if any. It does not escape the Court's attention that the Plaintiff is an Insurance Broker. There is no evidence before Court that Plaintiff procured the Insurance cover for Defendant from an Insurance Company.

13. There is even discrepancy between the total claim of the Plaintiff and

the document he relies upon as proof of the claim. The contract annexed to the application shows that the total amount agreed was Kshs. 11,356,767/-. The claim in this suit is for Kshs. 62,052,121. Granted that Plaintiff alleged the contract was both oral and in writing, and bearing in mind that Plaintiff's claim is denied, Plaintiff cannot in summary judgment application rely on oral agreement. That is evidence which must be tested in cross examination.

14. Plaintiff's claim includes an aspect of accrued interest. There is no

document before Court that permits Plaintiff to claim interest on amount allegedly due.

15. With the above, unresolved issues I do find that this is not a proper

case for the entry of summary judgment. It is essential that the case do proceed to trial. The Plaintiff request for Court to order the Defendant to deposit the claimed amount in Court, will not be granted particularly as rightly submitted by Defendant's learned Counsel, that if such an order was made it would amount to public funds being tied up for a long duration which could affect Defendant's budget. I am in agreement with that submission.

16. In the end, Plaintiff's Notice of Motion dated 15th August 2013 is

dismissed with costs.

DATED and DELIVERED at MOMBASA this 5TH day of JUNE, 2014.

MARY KASANGO

JUDGE